No. 16-498	
Title:	**David Patchak, Petitioner** **v.** **Ryan Zinke, Secretary of the Interior, et al.**
Docketed:	October 13, 2016
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(15-5200)
Decision Date:	July 15, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 11 2016	Petition for a writ of certiorari filed. (Response due November 14, 2016)
Nov 11 2016	Brief of respondent Match-E-Be-Nash-She-Wish band of Pottawatomi Indians in opposition filed.
Nov 14 2016	Waiver of right of respondent Sally Jewel, Secretary of the Interior, et al. to respond filed.
Nov 14 2016	Motion for leave to file amici brief filed by Federal Courts Scholars.
Nov 28 2016	Opposition of intervenor-respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, to motion for leave to file amicus curiae brief of Federal Courts Scholars filed.
Nov 30 2016	DISTRIBUTED for Conference of January 6, 2017.
Dec 15 2016	Response Requested. (Due January 17, 2017)
Jan 12 2017	Order extending time to file response to petition to and including February 16, 2017.
Feb 15 2017	Order further extending time to file response to petition to and including March 20, 2017.
Mar 20 2017	Brief of Federal Respondents in opposition filed.

Apr 03 2017	Reply of petitioner David Patchak filed.
Apr 05 2017	DISTRIBUTED for Conference of April 21, 2017.
Apr 24 2017	DISTRIBUTED for Conference of April 28, 2017.
May 01 2017	Motion for leave to file amici brief filed by Federal Courts Scholars GRANTED.
May 01 2017	Petition GRANTED limited to Question 1 presented by the petition.
May 16 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 13, 2017.
May 16 2017	The time to file respondents' briefs on the merits is extended to and including September 11, 2017.
Jul 12 2017	Joint appendix filed. (Statement of costs filed)
Jul 12 2017	Brief of petitioner David Patchak filed.
Jul 19 2017	Brief amici curiae of Federal Courts Scholars filed.
Aug 31 2017	SET FOR ARGUMENT on Tuesday, November 7, 2017
Sep 07 2017	CIRCULATED
Sep 11 2017	Brief of respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians filed. (Distributed)
Sep 11 2017	Brief of Federal Respondents filed. (Distributed)
Sep 12 2017	Record requested from the U.S.C.A. District of Columbia Circuit.
Sep 15 2017	Blanket Consent filed by Respondent, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians on 09/15/2017
Sep 18 2017	Brief amici curiae of Wayland Township, et al. filed. (Distributed)
Sep 18 2017	Brief amicus curiae of U.S. House of Representatives filed. (Distributed)

Sep 18 2017	Brief amicus curiae of National Congress of American Indians filed. (Distributed)
Sep 18 2017	Brief amici curiae of Federal Courts and Federal Indian Law Scholars filed. (Distributed)
Sep 18 2017	Brief amicus curiae of Professor Edward A. Hartnett filed. (Distributed)
Sep 18 2017	Motion for divided argument filed by respondent.
Oct 10 2017	Motion for divided argument filed by respondent GRANTED.
Oct 11 2017	Reply of petitioner David Patchak filed. (Distributed)
Nov 07 2017	Argued. For petitioner: Scott E. Gant, Washington, D. C. For federal respondents: Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians respondent: Pratik A. Shah, Washington, D. C.

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RECORD AND BRIEFS

Supreme Court, U.S.
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16-498

No. 16-___

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

CONFERENCE
APR 21 2017

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

CONFERENCE
JAN 06 2016

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QUESTIONS PRESENTED

Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land ("the Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) (*"Patchak I"*).

While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case "relating to" the Bradley Property "shall be promptly dismissed," but did not amend any underlying substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

1. Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?

2. Does a statute which does not amend any generally applicable substantive or procedural laws, but deprives Petitioner of the right to pursue his pending lawsuit, violate the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is David Patchak, the plaintiff below.

Respondents are Sally Jewell, Secretary of the Interior, and Lawrence Roberts, Assistant Secretary of the Interior, both defendants below, as well as the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below.

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The Opinion of the United States Court of Appeals for the District of Columbia Circuit addressing issues presented in this Petition was issued on July 15, 2016, is reported at 828 F.3d 995, and is reproduced in the separately bound Appendix to this Petition as Appendix A at 1a.[1] The D.C. Circuit's July 15, 2016 Judgment is reproduced as Appendix B at 23a.

The June 17, 2015 Opinion of the United States District Court for the District of Columbia, addressing issues presented in this Petition, is reported at 109 F. Supp.3d 152 (D.D.C. 2015), and is reproduced as Appendix D at 27a.

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[1] References to the Appendices to this Petition are in the form "1a."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit issued its opinion and entered Judgment on July 15, 2016. *See* Appendix A and B.

CONSTITUTIONAL & STATUTORY PROVISIONS

This Petition concerns the constitutionality of the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113–179, 128 Stat. 1913, addressing whether it violates separation of powers principles and the Fifth Amendment to the United States Constitution. The text of the Gun Lake Act and relevant constitutional provisions are reproduced in the accompanying Appendix.[2]

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[2] Although the Appendix contains only portions of Article III (and Article I), as the Court has observed: "the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of . . . the structural imperatives of the Constitution as a whole." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982).

INTRODUCTION

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 870 (1991). "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

This Petition concerns the constitutionality of a statute through which Congress has intruded upon the judicial power.

Section 2(b) of the statute at issue, the Gun Lake Act, directed the federal courts to "promptly dismiss[]" Petitioner's pending case after this Court had reviewed it, and held that his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2203 (2012) (*"Patchak I"*). The statute—which concerns only the one piece of property at issue in Petitioner's lawsuit, and affected only his case—mandated dismissal without amending underlying substantive or procedural laws.

The D.C. Circuit concluded the Gun Lake Act is constitutional. Petitioner respectfully submits that conclusion was erroneous—and sets a dangerous precedent, permitting Congress to encroach upon and exercise powers reserved for the judiciary. If Congress may direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or

procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.

The Court should grant this Petition to address the exceptionally important separation of powers issues presented, and clarify aspects of the boundary between the legislative and judicial powers not directly addressed by the Court's prior decisions. *See* SUP. CT. R. 10(c).

STATEMENT OF THE CASE

A. Petitioner's Complaint in the District Court

On April 18, 2005, the Department of the Interior announced its intention to employ the Secretary's authority under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, to take into trust land ("the Bradley Property") for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Gun Lake Tribe"). 70 Fed. Reg. 25596 (May 13, 2005). The Gun Lake Tribe had been recognized by the Department of the Interior in October 1998. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1998).

Petitioner is a resident of Wayland Township, Michigan, who lives in close proximity to the Bradley Property. On August 1, 2008, he filed a complaint in the United States District Court for the District of Columbia, asserting a claim under the Administrative Procedure Act (APA) against the then-Secretary and Assistant Secretary of the Interior, challenging the Secretary's authority under

the IRA to take the Bradley Property into trust for the Gun Lake Tribe.[3] Petitioner argued that acquisition of the Bradley Property for the Gun Lake Tribe (which had not yet occurred because of unrelated litigation following the announcement of the Interior Secretary's intentions) was unauthorized by the IRA because the Tribe was not recognized and "under federal jurisdiction" when the IRA was enacted in 1934. The Gun Lake Tribe filed a motion to intervene, which was granted by the District Court.

While Petitioner's case was pending in the District Court, on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Gun Lake Tribe. *Patchak I*, 132 S.Ct. at 2204.

Less than a month after the Bradley Property was taken into trust by the Secretary, this Court issued its decision in *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), holding that the IRA "limits the [Interior] Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

Although *Carcieri* cast substantial doubt on the legality of the Secretary's action taking the Bradley Property into trust for the Gun Lake Tribe, which had obtained federal recognition in 1998, the District Court did not reach the merits of Petitioner's APA claim. Instead, on August 19, 2009, the District

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[3] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

Court issued an opinion finding that Petitioner lacked prudential standing, and contemporaneously issued an order granting the United States' motion to dismiss and the Gun Lake Tribe's motion for judgment on the pleadings. *Patchak v. Salazar*, 646 F. Supp.2d 72 (D.D.C. 2009).

On appeal, the D.C. Circuit reversed the District Court's dismissal of Petitioner's APA claim, finding he had both prudential and Article III standing. *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). The D.C. Circuit also addressed the question of sovereign immunity briefed by the parties, but not decided by the District Court, concluding that sovereign immunity had been waived. *Id.* at 712.

B. This Court's Prior Decision in this Case

This Court granted the Petitions for certiorari, seeking review of the D.C. Circuit's judgment. 132 S.Ct. 845. The Court considered two questions arising from Petitioner's lawsuit: whether the United States has sovereign immunity by virtue of the Quiet Title Act, 86 Stat. 1176, and whether Petitioner has prudential standing to challenge to Interior Secretary's acquisition of the Bradley Property. The Court determined that sovereign immunity had been waived, and that Petitioner has prudential standing, and "therefore h[e]ld that Patchak's suit may proceed." *Patchak I*, 132 S.Ct. at 2203.

C. Congress's Action to Terminate Petitioner's Lawsuit

Following this Court's decision in *Patchak I*, while Petitioner's case was moving forward in the District Court, Congress took up consideration of

what became the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act). Pub. L. No. 113–179, 128 Stat. 1913.[4]

Section 2(a) provides: "IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."

Section 2(b) provides: "NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed."[5]

The Gun Lake Act originated in the Senate, as S. 1603, with a single sponsor and one co-sponsor (both Senators from Michigan, where the Bradley Property is located).

The Senate Committee on Indian Affairs held a hearing during May 2014. At that hearing, the Gun Lake Tribe's Chairman urged passage of the bill because the trust status of his Tribe's land "is now threatened by a U.S. Supreme Court opinion

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[4] The full text of the statute is reproduced as Appendix E at 50-51a.

[5] The statute does not contain a severability provision.

[*Patchak I*] that has allowed one individual to challenge the authority of the Secretary of Interior to take land into trust for our Tribe," and because "it is now time for this dispute to come to an end." *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509 at 55 (2014) (statement of David K. Sprague).

At the same Senate hearing the Assistant Secretary–Indian Affairs from the Department of the Interior also pressed for enactment of the bill, contending that this Court's decision in *Patchak I* "undermines the primary goal of Congress in enacting the Indian Reorganization Act" and "imposes additional burdens and uncertainty on the Department's long-standing approach to trust acquisitions ...." The Assistant Secretary expounded on his criticism of this Court's opinion in *Patchak I*, opining on the need for "legislation to address *Patchak*." *Id.* at 9 (statement of Kevin Washburn).

The Senate Report addressing the bill observed that Petitioner's lawsuit "currently pending before a federal district court [] places in jeopardy the Tribe's only tract of land held in trust .... The bill would provide certainty to the legal status of the land" and "would extinguish all rights to legal actions relating to the trust lands." S. Rep. No. 113-194, at 2-3 (2014). The Report also stated that enactment "will not make any changes in existing law." *Id.* at 4.

The Senate approved S. 1603 by voice vote on June 19, 2014.

The legislation then moved to the House, where the Subcommittee on Indian and Alaska Native Affairs held a hearing during July 2014. At that

hearing, the Gun Lake Tribe's Chairman and the Assistant Secretary–Indian Affairs provided testimony substantively identical to their testimony before the Senate Committee on Indian Affairs. *See Legislative Hearing on S. 1603 Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources* (July 15, 2014) (statement of David K. Sprague) (testimony of Kevin Washburn).

The House Report addressing the bill observed "[t]he need for S. 1603 stems from what is now understood to be a likely unlawful acquisition of land by the Secretary for the Gun Lake Tribe," and "S. 1603 would void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property . . . filed by a neighboring private landowner named David Patchak." H. Rep. No. 113-590, at 2 (2014). The House Report also noted that "S. 1603 is necessary because there is no consensus in Congress on how to address *Carcieri* [555 U.S. 379 (2009)]," and—like the Senate Report—stated that enactment "would make no changes in existing law." *Id.* at 2, 5.

On September 16, 2014, the House voted 359-64 in favor of the bill.

The Gun Lake Act was signed by the President on September 26, 2014.

D. Decisions Below Concerning the Gun Lake Act

Because summary judgment briefing was underway in the District Court when the Gun Lake Act became law, the parties addressed its constitutionality in conjunction with other issues and arguments relevant to those motions.

Petitioner argued to the District Court that the Gun Lake Act is unconstitutional for several reasons—including that it violates separation of powers principles and the Fifth Amendment, as well as the First Amendment's right to petition, and the prohibition on bills of attainder. The District Court, however, rejected each of these arguments, and found that "the Gun Lake Act is constitutional" and that "the Act's plain language and legislative history manifest a clear intent to moot this litigation." Appx. D at 34a, 36a. Believing it "lack[ed] the jurisdiction to reach the merits of plaintiff's claim," the District Court granted the Gun Lake Tribe's motion for summary judgment. Appx. D at 36a.

On appeal, the D.C. Circuit rejected all arguments that the Gun Lake Act is unconstitutional, and affirmed the District Court's disposal of the case because "if an action relates to the Bradley Property, it must promptly be dismissed." Appx. A at 11a-12a.

REASONS FOR GRANTING THE PETITION

I. The Court Must Guard Against Separation of Powers Violations

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Consistent with this "responsibility to enforce the [separation of powers] principle when necessary," *Metropolitan Washington Airports*

Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991), the Court has numerous times found constitutional violations based on separation of powers considerations. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 503 (2011) (finding unconstitutional vesting in bankruptcy court powers reserved for Article III judges); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (finding unconstitutional statute requiring federal courts to reopen final judgments); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (Congress "intruded into the executive function"); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (finding "legislative veto" unconstitutional); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (finding statute's assignment of certain powers to bankruptcy judges unconstitutional as "unwarranted encroachment" on the "judicial power"); *United States v. Klein*, 13 Wall. 128, 147 (1871) ("Congress has inadvertently passed the limit which separates the legislative from the judicial power.").

This Court's vital function as guardian of separation of powers safeguards and principles includes reviewing and deciding cases raising serious separation of powers questions—even if the Court ultimately concludes no violation has occurred. *See, e.g., Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016); *Miller v. French*, 530 U.S. 327 (2000); *Loving v. United States*, 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Freytag*, 501 U.S. 868; *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

II. The Questions Presented Are Exceptionally Important

"Time and again" this Court has "reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches." *Morrison*, 487 U.S. at 693.

Section 2(b) of the Gun Lake Act upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut*, 514 U.S. at 224. It directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending the IRA, the APA, or any other generally applicable statute. And it did so in order to overcome this Court's decision in *Patchak I*.

If Congress is permitted to direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees. And the threat to the judicial power posed by the Gun Lake Act is particularly grave because it was enacted with the purpose and effect of "void[ing]" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, after this Court expressly held that it "may proceed." *Patchak I*, 132 S.Ct. at 2203.

III. The Case is an Ideal Vehicle to Address Unresolved Issues Concerning the Separation of Powers, and Clarify When Congress Has Infringed the Judicial Power

Section 2(b) of the Gun Lake Act is an unprecedented intrusion on the judicial power. While Petitioner contends the Gun Lake Act should have been declared unconstitutional based on this Court's existing decisional law, the statute and the circumstances giving rise to it unquestionably test the limits of Congress's authority to act without intruding upon the judicial power. This case presents an important opportunity for the Court to clarify the boundaries of that authority. *See* SUP. CT. R. 10(c).

That this case concerns a single statute, directed at extinguishing a single pending federal court case, should not dissuade the Court from granting the Petition. While the adverse impact of the Gun Lake Act on Petitioner may not itself rise to the level of national significance, "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503.

Nor should the Court wait for Congress to again invade the judicial power as it has with Section 2(b) of the Gun Lake Act. "It is not every day that [the

Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. [The Court] should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment." *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2617 (2014) (Scalia, J., concurring).

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington v. FCC*, 133 S.Ct. 1863 (2013) (Roberts, C.J., dissenting). "[The Court] may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Association of American Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951. "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Department of Justice*, 491 U.S.

440, 468 (1989) (Kennedy, J., concurring in judgment)).[6]

IV. The D.C. Circuit's Decision is in Tension With Ninth Circuit Law

The D.C. Circuit's decision below is in tension with the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), which held that a statutory provision directing decisions in pending cases without amending any law was unconstitutional under this Court's decision in *Klein*, 13 Wall. 128 (1871). Although this Court reversed that Ninth Circuit decision in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) on other grounds, it did "not consider whether this reading of *Klein* is correct." *Id.* at 441.

The Ninth Circuit has continued to rely on its reading of *Klein* after this Court's decision in *Robertson*, 503 U.S. 429. *See, e.g., The Ecology Center v. Casaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993) ("This Court has interpreted *Klein* and related Supreme Court authority . . . as establishing a two-part, disjunctive test: The constitutional principle of separation of powers is violated where (1) 'Congress has impermissibly

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[6] Recognizing the importance of maintaining the separation of powers, the Court has granted review in numerous cases without the presence of conflicting lower court decisions. *See, e.g., Bank Markazi*, 136 S.Ct. 1310; *Stern*, 564 U.S. 462; *Loving*, 517 U.S. 748; *Plaut*, 514 U.S. 211; *Robertson*, 503 U.S. 429; *Freytag*, 501 U.S. 868; *Morrison*, 487 U.S. 654; *Bowsher*, 478 U.S. 714; *Chadha*, 462 U.S. 919; *Northern Pipeline*, 458 U.S. 50; *Nixon*, 433 U.S. 425; *Klein*, 13 Wall. 128.

directed certain findings in pending litigation, without changing any underlying law,' or (2) 'a challenged statute [is] independently unconstitutional on other grounds.'") (quoting *Robertson*, 914 F.2d at 1315-16). *Cf. United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) ("When the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it."); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight . . . .").

Granting the Petition would allow this Court to address and resolve tension between the D.C. Circuit's decision in this case and Ninth Circuit law. *See* SUP. CT. R. 10(a).

V. The Gun Lake Act Is Unconstitutional, and the D.C. Circuit's Decision to the Contrary Was Incorrect

It is difficult to imagine a more direct invasion of the judicial power than occurred here: Congress, without amending underlying substantive or procedural laws, directed that any case relating to the parcel of property which was the subject of Petitioner's APA claim "shall be promptly dismissed," after this Court expressly held that his "suit may proceed." *Patchak I*, 132 S.Ct. at 2203. If Congress had the power to intervene and dictate the

outcome in this case by enacting the Gun Lake Act, then it has the same, seemingly unlimited, power with respect to any pending case.

Although "it can sometimes be difficult to draw the line between legislative and judicial power," *Bank Markazi*, 136 S.Ct. at 1336 (Roberts, C.J., dissenting), this is not such a case. And "the entire constitutional enterprise depends on there *being* such a line." *Id.*

The Gun Lake Act dangerously violates separation of powers principles—and the D.C. Circuit's decision to the contrary was incorrect.

A. Section 2(b) of the Gun Lake Act Impermissibly Mandated that Petitioner's Lawsuit Be "Promptly Dismissed" Without Amending Underlying Substantive or Procedural Laws

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. And they deliberatively and decisively "rejected the practice [of colonial legislative review of judicial decisions] . . . because they believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment." *Id.* at 265-66 (Stevens, J., dissenting).

Adhering to the Framers' intention and constitutional design, the Court has repeatedly

confirmed that the judicial power cannot be shared with another branch of government. *See, e.g.*, *Stern*, 564 U.S. at 483; *Northern Pipeline*, 458 U.S. at 58; *United States v. Nixon*, 418 U.S. 683, 704 (1974). The Court also long ago recognized that "Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. 641, 648 (1874); *see also Hayburn's Case*, 2 Dall. 409, 413 (1792) (citing Letter from Iredell, J., and Sitgreaves, D.J., to President George Washington (June 8, 1792)) ("[N]o decision of any court of the United States can under any circumstances . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested."); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."). The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19.

Accordingly, one of "basic constraints on the Congress" imposed by the Constitution is that it may not "invest itself or its Members with either executive power or judicial power." *Metropolitan Washington Airports Authority*, 501 U.S. at 274; *see also Miller*, 530 U.S. at 350 ("[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design."); *Freytag*, 501 U.S. at 891 (finding Tax Court "exercises judicial power," noting "[i]ts decisions are

not subject to review by either the Congress or the President"); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of the Government.").

Although this Court has not previously confronted an intrusion on the judicial power quite like that effected by Section 2(b) of the Gun Lake Act, the principles recognized and secured in the Court's prior decisions instruct that the Gun Lake Act invades and weakens the judicial power, and thereby violates the separation of powers.

For example, Section 2(b) of the Gun Lake Act is similar to a portion of the statute at issue in *United States v. Klein*, 13 Wall. 128, 147 (1871), where the Court held that Congress had "passed the limit which separates the legislative from the judicial power," when it "directed" the courts "to dismiss" pending cases without altering applicable legal standards.

This case and *Klein* stand apart from those where the Court rejected separation of powers challenges to statutes which amended existing laws, and left the courts to apply new legal standards to the cases before them. *See, e.g.*, *Bank Markazi*, 136 S.Ct. at 1323-24 (contrasting that case with *Klein*), 1326 (no separation of powers violation because statute "changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested and uncontested) found by the court"). *Robertson*, 503 U.S. at 437 (no separation of powers

violation because statute "replaced legal standards . . . without directing particular applications under either the old or the new standards"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (addressing effect of change in underlying law by Congress).

While dissimilar to the statute actually at issue in *Bank Markazi*, the Gun Lake Act resembles the hypothetical statute discussed by Chief Justice Roberts in his *Bank Markazi* dissent, which directed that "Smith wins" his pending case, *Bank Markazi*, 136 S.Ct. at 1334-35 (Roberts, C.J., dissenting)—a statute which all members of the Court agreed "would be invalid." *Bank Markazi*, 136 S.Ct. at 1326 (noting potential constitutional infirmities, including Congress impermissibly compelling results "under old law" without "supply[ing] any new legal standard"). Indeed, Section 2(b) of the Gun Lake Act did precisely what this Court said had been impermissible in *Klein*: it "infringed the judicial power . . . because it attempted to direct the result without altering the [applicable] legal standards." *Id.*, 136 S.Ct. at 1324.

When Congress directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving*, 517 U.S. at 757.

B. Section 2(b) of the Gun Lake Act is Unconstitutional, Regardless of What Congress Intended to Accomplish in Section 2(a)

Section 2(a) of the Gun Lake Act provided that the Bradley Property "is reaffirmed as trust land," and "the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." The meaning and effect of this language is hardly self-evident. The Court of Appeals viewed Section 2(a) as having "changed the law" (Appx. A at 11a)—although it did not explain how.[7]

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[7] The D.C. Circuit also mistakenly viewed the Gun Lake Act as "removing *jurisdiction* from the federal courts over any actions relating to [the Bradley Property]." Appx. A at 2a. (emphasis added). This was an error for several reasons. First, the statute does not address jurisdiction—in fact, the word "jurisdiction" does not appear anywhere in its title, headings or text. Second, this Court has adopted a "bright line" test for determining whether a statutory limitation is jurisdictional, treating restrictions as nonjuridictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Regional Medical Center*, 135 S.Ct. 817, 824 (2013) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006)). This "bright line" test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Underscoring the absence of a clear statement is the Gun Lake Act's use of the term "maintain," which this Court has recognized is "ambiguous," and "enjoys a breadth of meaning." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 (2003). Third, the legislative history corroborates the statute is not jurisdictional—neither the House nor Senate Reports describe the law as altering federal court jurisdiction; to the contrary, each Report states the statute would not make any "changes in

Petitioner believes Section 2(a) did not put the Bradley Property into trust. As the statute itself clearly states, it was enacted to "[t]o reaffirm that certain land *has been* taken into trust"—this is, it conveyed Congress's post-hoc endorsement of the Interior Secretary's decision (which the House Report described as "likely unlawful"[8]), seemingly without *itself* changing the legal status of the property. For that reason, both the House and Senate Reports concerning the Gun Lake Act stated the statute would make no "changes in existing law." *See* H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014); *see also* (Appx. A at 11a) (D.C. Circuit noting Section 2(a) ratified and confirmed "*the Department of the Interior's* decision to take the Bradley Property into trust.") (emphasis added).

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existing law." *See* H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). But Section 2(b) of the Gun Lake Act would violate the separation of powers even if the statute was ostensibly "jurisdictional." When enacting the Gun Lake Act "Congress's sole concern was deciding this particular case." *Bank Markazi*, 136 S.Ct. at 1333 (Roberts, C.J., dissenting). Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction would not permit it to exercise the judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities. *Cf. City of Boerne*, 521 U.S. at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."). And, in any event, the importance of the Questions Presented by this Petition would not be diminished were the Gun Lake Act labeled as a jurisdictional statute.

[8] H. Rep. No. 113-590, at 2.

But even if the *intent* of Section 2(a) was to put the Bradley Property into trust, this would have led to numerous legal issues ***to be decided by the courts***—including (1) whether Section 2(a) actually did take the land into trust; and (2) if Section 2(a) did take the land into trust, how that impacted Petitioner's pending APA claim (including his entitlement to relief requested in his Complaint, such as a declaration that *the IRA* did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees—neither of which are obviously impacted by Section 2(a), regardless of how it is interpreted).

Among the issues confronting the courts interpreting and applying Section 2(a) would have been any purported retroactive effect of Congress taking the Bradley Property into trust long after Petitioner filed his APA claim, and subsequent to this Court's decision that his APA claim "may proceed." *See Johnson v. United States,* 529 U.S. 694, 701 (2000) ("Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests"); *Landgraf v. USI Film Products,* 511 U.S. 244, 280 (1994) (requiring clear statement for retroactive civil legislation).

Yet the lower courts *could not* address any unresolved legal questions arising from Section 2(a) —including the meaning and effect of that provision, and its potential retroactive application—because Congress precluded the Courts from deciding any of these when, in Section 2(b), it directed that Petitioner's pending case "shall be promptly dismissed." The D.C. Circuit—while mistaken about the constitutionality of the Gun Lake Act—made

clear Section 2(b) was dictating the outcome of Petitioner's appeal, explaining: "if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action." Appx. A at 11a-12a.

Thus, the presence of Section 2(a) in the Gun Lake Act does not cure the profound separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced a host of *new*, unsettled legal issues pertinent to Petitioner's APA case. However, with Section 2(b) of the Act, Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts of the case.

Perhaps Section 2(a) would have aided the Secretary in defending against Petitioner's APA claim on the merits. But Congress decided Petitioner's case by itself when mandating that it be "promptly dismissed"—and in so doing exercised the judicial power reserved for the federal courts by Article III. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) ("the judicial function [is] deciding cases"); *Ex Parte Slater*, 246 U.S. 128, 133 (1918) ("[E]xercise of the judicial function" is "applying recognized legal and equitable principles to the facts in hand").

C. Petitioner Has Been Deprived of Individual Rights Which Structural Separation of Powers Principles are Designed to Safeguard

"The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011); *see*

also Noel Canning, 134 S.Ct. at 2593 (It is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'") (Scalia, J., concurring) (quoting *Bond*, 564 U.S. at 223). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

The threat to individual rights is particularly acute when the political braches intrude upon the judicial power. Separation of the judiciary was "to guarantee that the process of adjudication itself remained impartial," *Northern Pipeline*, 458 U.S. at 58, and Article III safeguards litigants' "rights to have claims decided before judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980).

Having experienced and rejected a system of intermingled legislative and judicial powers, *Plaut*, 514 U.S. at 219, the Framers recognized—as has this Court—that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton, quoting 1 Montesquieu, Spirit of Laws 181); *see also Stern*, 564 U.S. at 483.

Here, with Section 2(b)'s mandate that Petitioner's pending case be "promptly dismissed," Congress arrogated to itself the judicial role of deciding Petitioner's APA claim—and did so after this Court had already determined that his "suit

may proceed." In so doing, Congress stripped Petitioner of his individual right to have his claim adjudicated by a neutral judge, free of political interference.

Section 2(b) also deprived Petitioner of his right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Gun Lake Act concerns only the Bradley Property and—as the D.C. Circuit acknowledged—"only affected [Petitioner's] lawsuit." Appx. A at 12a. The statute did not change any generally applicable substantive or procedural laws—including the APA and the IRA. Instead, as the text and legislative history make clear, its purpose and effect was to "void" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, stripping him of the right to continue pursuing what this Court described as a "garden variety APA claim" alleging that "the Secretary's decision to take land into trust violates a federal statute." *Patchak I*, 132 S.Ct. at 2208.[9]

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[9] Even if Section 2(a) had the effect of taking the Bradley Property into trust at the time the Gun Law Act was enacted, the statute does not state it would have retroactive effect, and in any event Section 2(a) has no bearing on the core of Petitioner's APA claim: a challenge to *the Interior Secretary's authority under the IRA* to take the land into trust. With Section 2(b), Congress left the APA's substantive and procedural provisions available to everyone but Petitioner (there were no other pending suits concerning the Bradley Property). As a result, Petitioner lost his right to seek a declaration that the IRA did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees.

Section 2(b) violates Petitioner's right to equal protection, regardless of what level of scrutiny is applied. Even under rational basis scrutiny, a classification must bear "a rational relationship to a legitimate end." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, the only objective evident from Section 2(b)'s text and the legislative history is overcoming this Court's decision in *Patchak I*, and extinguishing Petitioner's lawsuit after this Court held that his "suit may proceed." *Patchak I*, 132 S.Ct. at 2203. That is not a "legitimate end" capable of sustaining disparate treatment.[10]

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[10] That the Gun Lake Act concerns only the Bradley Property, and was specifically intended to dispose of Petitioner's lawsuit, suggests Congress sought to impermissibly *apply* the law, rather than make it. *See Plaut*, 514 U.S. at 241 (Breyer, J., concurring) (discussing relevance of statute's "application to a limited number of individuals"); *see also United States v. Brown*, 381 U.S. 437, 442 (1965) (Bill of Attainder Clause intended to supplement separation of powers, acting as "a general safeguard against legislative exercise of the judicial function").

CONCLUSION

Congress has "passed the limit which separates the legislative from the judicial power," but "[i]t is of vital importance that these powers be kept distinct." *Klein*, 13 Wall. at 147.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

October 2016

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges.*

Argued May 13, 2016
Decided July 15, 2016

Opinion for the Court filed by Circuit Judge WILKINS.

Appendix A

WILKINS, *Circuit Judge*: David Patchak brought this suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, challenging the authority of the Department of the Interior to take title to a particular tract of land under the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The land, called the Bradley Property, had been put into trust for the use of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in Michigan, otherwise known as the Gun Lake Band or the Gun Lake Tribe.

Following the Supreme Court's determination in 2012 that Mr. Patchak had prudential standing to bring this lawsuit, *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), Congress passed the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014), a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, and removing jurisdiction from the federal courts over any actions relating to that property. Taking into account this new legal landscape, the District Court determined on summary judgment that it was stripped of its jurisdiction to consider Mr. Patchak's claim. Holding additionally that the Act was not constitutionally infirm, as Mr. Patchak contended, the District Court dismissed the case.

Mr. Patchak now appeals the dismissal of his suit, as well as a collateral decision regarding the District Court's denial of a motion to strike a supplement to the administrative record. For the reasons stated below, we affirm the District Court's determination that the Gun

Lake Act is constitutionally sound and, accordingly, that Mr. Patchak's suit must be dismissed. We further conclude that the District Court did not abuse its discretion by denying Mr. Patchak's motion to strike a supplement to the administrative record.

I.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Gun Lake Tribe) is an Indian tribe whose members descend from a band of Pottawatomi Indians, led by Chief Match-E-Be-Nash-She-Wish, who occupied present day western Michigan. *See Proposed Findings for Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 62 Fed. Reg. 38113, 38113 (July 16, 1997). While the Tribe had been a party to many treaties with the United States government in the 18th and 19th centuries, it only began pursuing federal acknowledgement under the modern regulatory regime of the Bureau of Indian Affairs, 25 C.F.R. §§ 83.1-83.46, in 1992. The Tribe was formally recognized by the Department of the Interior in 1999. In 2001, the Tribe petitioned for a tract of land in Wayland Township, Michigan — called the Bradley Property — to be put into trust under the IRA. The Tribe sought to use the land to construct and operate a gaming and entertainment facility. The Bureau of Indian Affairs approved the petition in 2005, placing the Bradley Property into trust for the Tribe's use. *See Notice of Determination*, 70 Fed. Reg. 25596, 25596 (May 13, 2005). The Gun Lake Casino opened on February 10, 2011.

Appendix A

David Patchak lives in a rural area of Wayland Township commonly referred to as Shelbyville, in close proximity to the Bradley Property. Mr. Patchak asserts that he moved to the area because of its unique rural setting, and that he values the quiet life afforded him there. Mr. Patchak filed the present lawsuit against the Secretary of the Interior and the Assistant Secretary of the Interior for the Bureau of Indian Affairs on August 1, 2008, invoking the court's jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 705. Mr. Patchak claimed that he would be injured by the construction and operation of a casino in his community because it would, among other things, irreversibly change the rural character of the area, increase traffic and pollution, and divert local resources away from existing residents. Mr. Patchak argued that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked the authority to put the Bradley Property into trust for the Gun Lake Tribe.[1] The Gun Lake Tribe intervened as a defendant.

In response to Mr. Patchak's complaint, the United States and the Tribe claimed that Mr. Patchak lacked prudential standing because his interest in the Bradley Property was "fundamentally at odds with the purpose

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1. Mr. Patchak's arguments on the merits of his claim rely heavily on the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), published after he initially filed his lawsuit. *Carcieri* interpreted part of the recognition provision of the IRA, 25 U.S.C. § 479. 555 U.S. at 387-93. Because we do not reach the merits of Mr. Patchak's claim in this appeal, we do not consider the impact of *Carcieri* in this case.

of the IRA" and he therefore did not fall within the IRA's "zone of interests." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The District Court agreed, and dismissed the complaint for lack of subject matter jurisdiction. *Id.* at 76, 79. Patchak appealed to this Court, and we reversed. *See Patchak v. Salazar*, 632 F.3d 702, 394 U.S. App. D.C. 138 (D.C. Cir. 2011). The Supreme Court agreed, holding that Patchak did indeed have prudential standing to bring his suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2212. The case was remanded to the District Court for further proceedings.

In the time between the Supreme Court's prudential standing determination and the parties' renewed attention to the case, both the Department of the Interior and Congress weighed in further on the legal status of the Gun Lake Tribe and the Bradley Property, respectively. First, the Department of the Interior issued an Amended Notice of Decision approving an application the Tribe had submitted for two other parcels of land it sought to acquire. As part of this Notice of Decision, the Secretary expressly considered, and confirmed, its authority to take land into trust for the benefit of the Gun Lake Tribe. Second, on September 26, 2014, President Obama signed the Gun Lake Act into law. The substantive text of the Gun Lake Act is as follows:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of

> the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.
>
> (c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Gun Lake Act § 2.

Shortly following the enactment of the Gun Lake Act, the parties filed motions for summary judgment. The District Court determined that, as a result of this legislation, it was now stripped of jurisdiction to consider Mr. Patchak's claim. *See Patchak v. Jewell*, 109 F. Supp. 3d 152, 159 (D.D.C. 2015). Rejecting Mr. Patchak's constitutional challenges to the Gun Lake Act, the District Court granted summary judgment in favor of the Government and the Tribe, and dismissed the case. *Id.* at 160-65. The District Court also denied Mr. Patchak's

Appendix A

Motion to Strike the Administrative Record Supplement, which had challenged the addition of the Amended Notice of Decision to the record before the court. *See* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). Mr. Patchak now appeals those decisions.

II.

The language of the Gun Lake Act makes plain that Congress has stripped federal courts of subject matter jurisdiction to consider the merits of Mr. Patchak's complaint, which undisputedly "relat[es] to the land described" in Section 2(a) of the Act. Gun Lake Act § 2(b). Accordingly, Patchak's suit "shall not be . . . maintained . . . and shall be promptly dismissed." *Id.* Of course, this is only so if the Gun Lake Act is not otherwise constitutionally infirm, as "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (citing RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 (4th ed. 1996)). The federal courts have "presumptive jurisdiction . . . to inquire into the constitutionality of a jurisdiction-stripping statute." *Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008).

Mr. Patchak's constitutional challenges to the Gun Lake Act are pure questions of law that we review *de novo*. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001).

Appendix A

A.

Mr. Patchak first argues that the Gun Lake Act encroaches upon the Article III judicial power of the courts to decide cases and controversies, in violation of wellestablished constitutional principles of the separation of powers. Article III imbues in the Judiciary "the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). This endowment of authority necessarily "blocks Congress from 'requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.'" *Id.* at 1322-23 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases. *See Bank Markazi*, 136 S. Ct. at 1325. Without question, "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Id.* This rule is no different when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096. It is well settled that "Congress has the power (within limits) to tell the courts what classes of cases they may decide." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Congress may not, however, "prescribe or superintend how [courts] decide those cases." *Id.* at 1869. Congress impermissibly encroaches upon the judiciary when it "prescribe[s] rules of decision" for a pending case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). In short, Congress may

not direct the result of pending litigation unless it does so by "supply[ing] new law." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992). Mr. Patchak argues that the Gun Lake Act did not provide any new legal standard to apply, but rather impermissibly directed the result of his lawsuit under pre-existing law.

These principles do not require, as Mr. Patchak suggests, that in order to affect pending litigation, Congress must directly amend the substantive laws upon which the suit is based. Indeed, Supreme Court precedent belies such a contention.

In *Seattle Audubon*, for example, the Supreme Court considered the impact of new legislation on pending cases challenging the federal government's efforts to allow the harvesting and sale of old-growth timber in the Pacific Northwest. 503 U.S. at 431. The legislation was the Northwest Timber Compromise, a provision of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989). *Id.* at 433. It established rules to govern the forest harvesting at issue in the pending consolidated cases, and spoke expressly to those suits — even identifying them by caption number. *Id.* at 433-35. If loggers complied with the new rules, Congress posited, they would thereby satisfy the statutory obligations on which the pending environmental litigation rested. *Id.* The Ninth Circuit held that the Northwest Timber Compromise unconstitutionally dictated the outcome of pending litigation without amending the underlying laws, but the Supreme Court disagreed. The Court held that the legislation effectively "replaced the legal standards

underlying the two original challenges . . . without directing particular applications under either the old or the new standards." *Id.* at 436-37. Because the provision "compelled changes in law," *id.* at 438, the Court concluded that the provision "affected the adjudication of the [specifically identified] cases . . . by effectively modifying the provisions at issue in those cases," *id.* at 440.

The Supreme Court's recent *Bank Markazi* decision likewise applied new legislation to pending litigation. That legislation did not directly amend or modify the particular statute upon which the pending litigation was based. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, 22 U.S.C. § 8772 (2012) had been passed in order "[t]o place beyond dispute" the availability of certain assets for satisfaction of judgments rendered in certain specifically identified terrorism cases. *Bank Markazi*, 136 S. Ct. at 1318. The statute was enacted as a freestanding measure, not as an amendment to the Foreign Sovereign Immunities Act of 1976 (FSIA) (which allows American nationals to file suit against state sponsors of terrorism in United States courts, *see* 28 U.S.C. § 1605A), or the Terrorism Risk Insurance Act of 2002 (TRIA) (which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of [a] terrorist party"). *Id.* Rejecting a challenge similar to the one Mr. Patchak pursues here — that the provision "did not simply amend pre-existing law," *id.* at 1325 — the Court held that "§ 8772 changed the law by establishing new substantive standards," *id.* at 1326. As the Court explained, "§ 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored

terrorist attacks will be permitted to execute against those assets." *Id.*

Our decision in *National Coalition to Save Our Mall* is also instructive. There, we considered a separation-of-powers challenge to a statute that withdrew from the federal courts subject matter jurisdiction to review challenges to specific executive decisions relating to the placement of the World War II Memorial on the National Mall. 269 F.3d at 1096-97. In rejecting that challenge, we emphasized that there is no "prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Id.* at 1096. And while this Court "express[ed] no view" on the question whether a court could do so without amending the substantive law on which a pending claim rested, we did note that the provision at issue (Public Law No. 107-11) "present[ed] no more difficulty than the statute upheld in [*Seattle Audubon*], as Public Law No. 107-11 similarly amend[ed] the applicable substantive law." 269 F.3d at 1097.

Consistent with those decisions, we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." *Bank Markazi*, 136 S. Ct. at 1326. More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action

relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

That this change has only affected Mr. Patchak's lawsuit does not change our analysis here, for Congress is not limited to enacting generally applicable legislation. Particularized legislative action is not unconstitutional on that basis alone. *See Bank Markazi*, 136 S. Ct. at 1327-28; *Plaut*, 514 U.S. at 239 n.9; *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1097. "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut*, 514 U.S. at 239 n.9.

In passing the Gun Lake Act, Congress exercised its "broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as '"plenary and exclusive."' *United States v. Lara*, 541 U.S. 193, 200 (2004). Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary." *Bank Markazi*, 136 S. Ct. at 1326.

B.

Mr. Patchak next asserts that the Gun Lake Act burdens his First Amendment right to petition. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). The Petition Clause "protects the right of individuals to appeal to courts and other forums established by the government

for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

The right of access to courts is, without question, "an aspect of the First Amendment right to petition the government." *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)); *see also Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 513 (1972). It is an important right, *see Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983), but it is not absolute, *see McDonald v. Smith*, 472 U.S. 479, 484 (1985). For example, an individual does not have a First Amendment right of access to courts in order to pursue frivolous litigation. *Id.* More to the point, the right to access federal courts is subject to Congress's Article III power to define and limit the jurisdiction of the inferior courts of the United States. *See* U.S. CONST. art. III, § 1; *cf. Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Ameur v. Gates*, 759 F.3d 317, 326 (4th Cir. 2014). Congress may withhold jurisdiction from inferior federal courts "in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

Moreover, the Gun Lake Act does not foreclose Mr. Patchak's right to petition the government in all forums; it affects only his ability to do so via federal courts. And while he argues that other forms of petition — such as seeking redress directly from the agency — would be futile, Patchak concedes that he is not entitled to a successful outcome in his petition, or even for the government to listen or respond to his complaints. Rightfully so. "Nothing

in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *see also We the People Found., Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007).

By stripping federal courts of subject matter jurisdiction over challenges to the status of the Bradley Property, Congress has made its determination as to what is "proper for the public good." *Palmore*, 411 U.S. at 401 (quoting *Cary*, 44 U.S. (3 How.) at 245). There is no constitutional infirmity here.

C.

Mr. Patchak also claims that the Gun Lake Act implicates his rights under the Fifth Amendment's Due Process Clause. The Fifth Amendment instructs that the federal government may not deprive individuals of property "without due process of law." U.S. CONST. amend. V. In order to determine whether there has been a violation of due process rights, we undertake a two-part inquiry: first, we must determine whether the claimant was deprived of a protected interest; and second, if the claimant was so deprived, we then consider what process the claimant was due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014).

Mr. Patchak identifies a potentially protected property interest in his unadjudicated claim. The Supreme Court has "affirmatively settled" that a cause of action is a species of property requiring due process protection. *Logan*, 455 U.S. at 428 (analyzing due process rights under the Fourteenth Amendment) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Surely so, as "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 430 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)). Once the legislature confers an interest by statute, it may not constitutionally authorize the deprivation of that interest without implementing appropriate procedural safeguards. *Id.* at 432.

But even assuming that there may be a property right to pursue a cause of action, in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due. As discussed above, the legislature has the power to change the underlying laws applicable to a case while it is pending and, as a result, to alter the outcome of that case. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096; *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (where "a law intervenes and positively changes the rule which governs, the law must be obeyed").

In *Logan*, the Supreme Court acknowledged that "[o]f course," a legislature "remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily-created causes of action

altogether—just as it can amend or terminate" benefits programs it has put into place. 455 U.S. at 432; *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 92 (1980) (Marshall, J., concurring) ("[T]he Due Process Clause does not forbid the 'creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929))). Indeed, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917). Accordingly, while a cause of action may be a "species of property" that is afforded due process protection, *Logan*, 455 U.S. at 428, there is no deprivation of property without due process when legislation changes a previously existing and still-pending cause of action, *id.* at 432. In such a circumstance, "the legislative determination provides all the process that is due." 455 U.S. at 433.

We have no reason to except the Gun Lake Act from this general approach. Congress made a considered determination to ratify the Department of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe, and further to remove any potential impediments to the finality of that decision. It did not violate Mr. Patchak's due process rights by doing so.

D.

Mr. Patchak's final constitutional challenge to the Gun Lake Act is that it constitutes an impermissible Bill of Attainder. *See* U.S. CONST. art. I, § 9, cl. 3. Under

this provision, Congress may not "enact[] 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)). A law is prohibited under the Bill of Attainder Clause if two elements are met: (1) the statute applies with specificity; and (2) the statute imposes punishment. *Id.* at 1217. We are able to resolve Mr. Patchak's challenge on the second element alone, because the Gun Lake Act is not punitive.

In order to decide whether a statute impermissibly inflicts punishment, we consider each case in "its own highly particularized context." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984) (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)). In so doing, we pursue a three-part inquiry:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment;
>
> (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and
>
> (3) whether the legislative record 'evinces a congressional intent to punish.'

Id. (quoting *Nixon*, 433 U.S. at 475-76, 478). These factors are considered independently, and are weighed together to resolve a bill of attainder claim. *See Foretich*, 351 F.3d at 1218. None of the three factors is necessarily dispositive, but this Court has noted that the second factor — what is called the "functional test" — "invariably appears to be the most important of the three." *Id.* (quoting *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998)).

Historically, laws invalidated as bills of attainder "offer[ed] a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [Article] I, § 9." *Nixon*, 433 U.S. at 473. "This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich*, 351 F.3d at 1218. Jurisdictional limitations are generally not of this type. *See Ameur*, 759 F.3d at 329 ("[J]urisdictional limits are usually not viewed as traditional 'punishment.'"); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) ("Jurisdictional limitations . . . do not fall within the historical meaning of legislative punishment."); *see also Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1253 n.9 (11th Cir. 2008) (declining to find that a "generally applicable jurisdictional rule" amounted to a bill of attainder in part because it "d[id] not impose punishment of any kind"); *Nagac v. Derwinski*, 933 F.2d 990, 991 (Fed. Cir. 1991) (jurisdictional limitation "d[id] not impose a punishment 'traditionally adjudged to be prohibited by the Bill of Attainder Clause'" (quoting *Nixon*, 433 U.S. at 475)).

The second prong of the inquiry, the "functional test," requires that the legislation have "a legitimate nonpunitive purpose" and that there is "a rational connection between the burden imposed and [the] nonpunitive purposes." *Foretich*, 351 F.3d at 1220-21. In other words, the means employed by the statute must be rationally designed to meet its legitimate nonpunitive goals.

The Gun Lake Act passes this test. The Gun Lake Act serves the legitimate nonpunitive purpose of "provid[ing] certainty to the legal status of the [Bradley Property], on which the Tribe has begun gaming operations as a means of economic development for its community." S. REP. No. 113-194, at 2 (2014). Congress accomplished this goal by affirming and ratifying the Department of the Interior's initial decision to put the land into trust for the Tribe in Section 2(a), but also by removing jurisdiction over matters relating to the land in Section 2(b). In point of fact, Congress's intended goal of providing certainty with respect to the trust land would have been impossible to achieve absent the termination of any outstanding litigation — specifically, Mr. Patchak's suit. The legislative history reflects an acknowledgement of this fact, noting that Mr. Patchak's suit "places in jeopardy the Tribe's only tract of land held in trust and the economic development project that the Tribe is currently operating on the land." *Id.* Whatever burden is imposed by Section 2(b), on Mr. Patchak or otherwise, the statute is rationally designed to meet its legitimate, nonpunitive purpose of providing certainty with respect to the trust land.

Finally, the legislative record does not evince a congressional intent to punish. Mr. Patchak has presented

no evidence, other than the acknowledgement that his case would be affected, for his claim that Congress purposefully targeted him for retaliation through the Gun Lake Act. While it may be true that Mr. Patchak was adversely affected as a result of the legislation, the record does not show that Congress acted with any punitive or retaliatory intent.

E.

The Government suggests that there is an alternative ground on which we could rule, arguing that the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity. While the Government did not make this argument in the proceedings below, sovereign immunity is a threshold jurisdictional question that speaks to the court's authority to hear a given case, and so we would be well within bounds to consider the question. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "Indeed, the 'terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Nevertheless, because we conclude that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn, we need not consider the matter further.

III.

In a separate challenge to the proceedings below, Mr. Patchak contends that the District Court erred by permitting the administrative record to be supplemented. We review the District Court's denial of Mr. Patchak's Motion to Strike the Administrative Record Supplement for abuse of discretion. *Cf. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

Although this case may not present circumstances typically permitting the agency to supplement the record, *see id.*, the District Court's failure to strike the supplemental information provided to it was not an abuse of discretion. The District Court denied Mr. Patchak's Motion to Strike Supplemental Record "[f]or the reasons set forth in the Memorandum Opinion" entered on the same date, *see* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). — *i.e.*, the District Court's determination, at issue in this appeal, that it was without jurisdiction to consider the suit and that the case was to be dismissed in its entirety, *Patchak v. Jewell*, 109 F. Supp. 3d 152 (D.D.C. 2015). The District Court only mentioned the record supplement in the Procedural Background section of its opinion in order to indicate the "events [that] have altered the legal landscape" in the time since the case was remanded from the Supreme Court. *Id.* at 158. The District Court did not abuse its discretion by referencing that development in this way. Nor did it abuse its discretion by denying a motion to strike a supplement to the record at the same time that it was dismissing the case in its entirety for lack of jurisdiction.

IV.

For the foregoing reasons, the District Court's decisions below are affirmed.

So ordered.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

September Term, 2015
Filed On: July 15, 2016

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*

Appendix B

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the decisions of the District Court appealed from in this cause are hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 15, 2016

Opinion for the court filed by Circuit Judge Wilkins.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, *et al.*,[1]

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

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1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the Court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior, for the former Secretary, Ken Salazar.

Appendix C

ORDER

For the reasons set forth in the Memorandum Opinion entered this date, it is this 16th day of June 2015, hereby

ORDERED that Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment [Dkt. #80] is **DENIED**; it is further

ORDERED that Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion to Strike the Administrative Record Supplement [Dkt. # 76] is **DENIED**; and it is further

ORDERED that this case be **DISMISSED**.

SO ORDERED.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX D

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,[1] *et al.*,

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

---

1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior for the former Secretary, Ken Salazar.

Appendix D

MEMORANDUM OPINION

(June 16, 2015) [Dkts. ##76, 78, 80, 89]

This case is before the Court on remand from the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States. Plaintiff David Patchak ("plaintiff") is challenging the Secretary of the Interior's ("Secretary") decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of the Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. In a Verified Complaint filed on August 1, 2008, plaintiff sought an injunction barring the Secretary from taking the land into trust, claiming that the Secretary lacked authority to do so under the IRA. Compl. ¶ 28 [Dkt. #1]. This Court dismissed the case for lack of standing on August 20, 2009. Mem. Op. [Dkt. #56]. Following remand by the Supreme Court, both parties filed motions for summary judgment. Presently before the Court are Plaintiffs Motion to Strike the Administrative Record Supplement [Dkt. #76], Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78], Plaintiff's Motion for Summary Judgment [Dkt. #80], and Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89]. Upon consideration of the parties' pleadings, the relevant case law, and the entire record herein, this Court DENIES Plaintiff's Motion to Strike the Administrative Record Supplement, GRANTS Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule,

Appendix D

DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Intervenor-Defendant's Motion for Summary Judgment.

BACKGROUND

This Opinion represents the latest chapter in plaintiff's quest to enjoin a gaming casino in Allegan County, Michigan. This case's history is, to say the least, lengthy, and the Court, for the sake of economy, recounts only those portions necessary to its holding.

I. Statutory Framework

Since the 1800s, Congress has enacted various statutes to regulate Indian affairs. One such initiative, the Indian Reorganization Act of 1934, was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage." *See* 1-1 Cohen's Handbook of Federal Indian Law § 1.05. Its animating purpose was therefore to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1973). To that end, the IRA authorizes the Secretary "to acquire . . . any interest in lands" on behalf of groups that meet the statutory definition of "Indians." *See* 25 U.S.C. § 465. The IRA defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[2] 25 U.S.C. § 479. Land

2. While the IRA does not elaborate on what it means to be a "recognized Indian Tribe now under Federal jurisdiction," the Supreme Court recently interpreted the word "now" to refer to the date of the IRA's enactment in June 1934. *Carcieri v. Salazar*, 555

acquired pursuant to the IRA "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired," 25 U.S.C. § 465, and may be designated as part of the Tribe's official reservation, *id.* at § 467.

Like the IRA, the Indian Gaming Regulatory Act of 1998 (the "IGRA") was enacted to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). To facilitate this goal, the IGRA provides "a statutory basis for the operation of gaming by Indian tribes," *id.*, and allows gaming on land that was taken into trust as part of the "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process," 25 U.S.C. § 2719(b)(1)(B). A tribe may be formally acknowledged if it can "establish a substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present." *See* 25 C.F.R. § 83.3(a).

II. Factual Background

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is now a federally-recognized Indian tribe. Compl. ¶ 18. But this was not always the case. The Tribe, though in existence for over two centuries, has endured a lengthy struggle for federal recognition. It was initially recognized by the federal government between 1795 and 1855, during which time it was party to no fewer than sixteen

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U.S. 379, 382 (2009). The Supreme Court left open the question of what constitutes "Federal jurisdiction."

treaties with the United States. Compl. ¶ 15; AR001987.[3] This recognition was, however, short-lived. Beginning in 1855, the Tribe fell victim to a slew of federal policies that divested the Tribe of both its ancestral lands and its sovereign status. *See* Compl. ¶¶ 16-17.

The Tribe remained dispossessed for much of the 20th century. *See* Compl. ¶ 16-18. In 1998, after decades of landlessness, the Tribe sought to reinstate its sovereign status under the modern federal acknowledgment procedures. Compl. ¶ 18. It succeeded. On October 23, 1998, the Secretary of the Interior proclaimed the Tribe an "Indian tribe within the meaning of Federal law," thus entitling the Tribe, and its members, to a bevy of federal protections. *See* 63 Fed. Reg. 56936-01 (1998).

In 2001, shortly after receiving federal acknowledgment, the Tribe identified a 147-acre tract of land in the Township of Wayland, Michigan, ("the Bradley Tract") that it wished to acquire as its "initial reservation" under the IRA. *See* AR001438. In its ensuing trust application, the Tribe requested permission to construct and operate a 193,500 square foot gaming and entertainment facility on the Bradley Tract. AR001445. The Tribe prevailed, and on May 13, 2005, the Department of the Interior issued a Notice of Final Agency Determination accepting the Bradley Tract into trust to "be used for the purpose of construction and operation of a gaming facility." 70 Fed. Reg. 25596-02 (May 13, 2005). In January 2009,

3. References to "AR" correspond to the Administrative Record filed on October 6, 2008. *See* [Dkt. #21].

the Secretary formally acquired the Bradley Tract on the Tribe's behalf. Decl. Chairman David K. Sprague Supp. Intervenor-Def.'s Mot. Summ. J. ("Sprague Decl.") ¶ 14 [Dkt. #78-1]. Thereafter, the Tribe incurred approximately $195,000,000 in debt to develop the land. Sprague Decl. ¶ 18. Its efforts culminated in the opening of the Gun Lake Casino on February 10, 2011. Sprague Decl. ¶ 19.

III. Procedural Background

Plaintiff filed the present lawsuit on August 1, 2008 under section 702 of the Administrative Procedure Act ("APA"), arguing that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked authority to take the Bradley Tract into trust. Compl. ¶¶ 25-28. On August 19, 2009, I dismissed this action for lack of subject matter jurisdiction. Mem. Op. [Dkt. #56]. Plaintiff appealed to our Circuit Court, which reversed and held that plaintiff indeed had standing to pursue his action. *See Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). On June 18, 2010, the United States Supreme Court affirmed the Circuit Court's decision and remanded the case to this Court for adjudication on the merits of plaintiff's suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

Since this case was remanded, two events have altered the legal landscape. First, on September 3, 2014, the Secretary issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two other parcels of land it sought to acquire. SAR000617-

58.[4] In so doing, the Secretary expressly considered, and confirmed, its authority under the IRA to take land into trust on behalf of the Tribe. *See* SAR000650 ("The [Tribe] unquestionably was under federal jurisdiction prior to 1934. . . . [And] the [Tribe's] under federal jurisdiction status remained intact in and after 1934."). Second, on September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act" or "the Act"). Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b). The Act, which bears directly on the instant case, declares as follows:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b).

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4. References to "SAR" are to the Administrative Record Supplement. *See* [Dkt. #75].

Thereafter, on October 31, 2014, the parties filed motions for summary judgment. For the following reasons, the Court GRANTS Intervenor-Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

DISCUSSION

Plaintiff would have this Court disregard the Gun Lake Act and proceed directly to the merits of his challenge. I decline to do so. Because the Gun Lake Act purports to moot plaintiffs case, it is hard to see how it can be ignored. To disregard it entirely would, moreover, violate the usual principle that a court is to apply the law in effect at the time it rules. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

As a fallback position, plaintiff argues that the Act is void because it violates numerous constitutional provisions, including separation of powers principles, the First Amendment Right to Petition, Fifth Amendment Due Process, and the ban on Bills of Attainder. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Mem.") at 25-39 [Dkt. #80-1]. For the reasons discussed herein, I reject each of these arguments and find that the Gun Lake Act is constitutional and, further, that it moots plaintiff's case.

I. APA REVIEW

Federal courts are courts of limited jurisdiction and may not reach the merits of a case absent jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

83, 101 (1998). Plaintiff brings his suit pursuant to the Administrative Procedure Act, which entitles any person "adversely affected or aggrieved by [an] agency action" to judicial review. *See* 5 U.S.C. § 702. As the APA makes clear, there is a "strong presumption" of reviewability of agency decisions. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption, "like all presumptions," may "be overcome by . . . specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 673 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)); *see* 5 U.S.C. § 701(a) (limiting judicial review to the extent that a federal statute "preclude[s] judicial review" or the "agency action is committed to agency discretion by law"). Once that presumption is overcome, courts may venture no further into the merits of the case. "For a court to pronounce upon the meaning" of federal action when "it has no jurisdiction to do is, by very definition, for a court to act ultra vires." *See Steel Co.*, 523 U.S. at 101-02. Such is the case here.

Section 2(b) of the Gun Lake Act states that "no claims" regarding the Secretary's decision to take the Bradley Tract into trust shall be "maintained in a Federal court." *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Section 2(b) tracks, moreover, section 2(a)'s ratification of the Secretary's decision, leaving no doubt that Congress intended to have the final word. *See id.* This intent is born out in the legislative history. The House Committee on Natural Resources stated, for example, that the Act, if passed, "would void a pending lawsuit [by neighboring landowner David Patchak] challenging the

lawfulness of the Secretary's original action to acquire the Bradley Property." H.R. Rep. 113-590 (2014). The Senate Committee on Indian Affairs agreed that the Act "would prohibit any lawsuits" related to the "lands taken into trust by the Department of the Interior (DOI) for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in the state of Michigan." S. Rep. 113-194 at 3 (2014). Taken together, the Act's plain language and legislative history manifest a clear intent to moot this litigation. Barring some constitutional infirmity, this Court therefore lacks jurisdiction to reach the merits of plaintiff's claim.

II. Constitutionality Of The Gun Lake Act

While Congress may have removed this Court's jurisdiction over plaintiff's APA claim, it did not foreclose consideration of the Gun Lake Act's constitutionality. Indeed, section 2(b) only withdraws judicial review of "action[s] relating to" the Secretary's acquisition of the Bradley Tract. *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Nothing in the Act bars consideration of constitutional challenges to *Congress*'s action, and the Court declines to construe it in such a fashion.[5] Absent

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5. To construct the statute otherwise would raise serious concerns about its constitutionality, and, in such a case, I heed the "cardinal principle" of statutory interpretation and choose "a construction of the statute . . . by which the (constitutional) question(s) may be avoided." *See Johnson v. Robison*, 415 U.S. 361, 367 (1974) (alternation in original) (internal quotation marks omitted); *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (finding that although a statute removed Article III jurisdiction

such an impediment, the Court may address plaintiff's constitutional challenges.

The Court's limited jurisdiction does not, however, guarantee plaintiff a victory. Quite the opposite is true. Federal statutes are presumptively constitutional, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), and litigants challenging a statute's constitutionality bear an "extremely heavy burden," *United States v. Turner*, 337 F. Supp. 1045, 1048 (D.D.C. 1972). Only "the most compelling constitutional reasons" may justify invalidating "a statutory provision that has been approved by both Houses of Congress and signed by the President." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (citation and internal quotation marks omitted). Unfortunately for plaintiff, I find that he has not surmounted this burden and, accordingly, uphold the Act.

A. Separation of Powers

Plaintiff argues that the Act raises two separation of powers concerns. Plaintiff first contends that section 2(b) infringes the role of the judiciary by requiring dismissal of this action. *See* Pl.'s Mem. at 26-32. Plaintiff next argues that by reaffirming the Secretary's May 2005 decision to take the Bradley Tract into Trust, section 2(a) unlawfully imposes Congress's "own interpretation of the IRA" on the federal courts. *See* Pl.'s Consol. Reply Defs.' & Intervenor-Def.'s Opp'n to Pl.'s Mot. Summ. J. ("Pl.'s Reply") at 31

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to review an agency action, it did "not touch [the court's] jurisdiction over [the statute's] own constitutionality").

[Dkt. #90]. For the reasons discussed below, I find both arguments unavailing.

Plaintiff's first contention presents a thorny legal issue. The Constitution prohibits the legislature from coopting the judiciary's function. The seminal case on this issue is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). There, the executor of a Confederate estate sought to recover property seized by the Union army during the Civil War. In his suit, the executor relied on a statute permitting recovery for landowners that were loyal to the Union, proof of which was satisfied by receipt of a Presidential pardon. *Id.* at 131-32. After the plaintiff recovered in the Court of Claims, Congress passed a statute directing courts to construe proof of a Presidential pardon as proof of disloyalty and, further, to dismiss, for lack of jurisdiction, any cases in which proof of a Presidential pardon was submitted. *Id.* at 133-34. Faced, on appeal, with a statute that dictated how it was to adjudicate claims of Union loyalty, the Supreme Court declared the statute unconstitutional and refused to give effect to an Act of Congress that "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *See id.* at 146.

Although *Klein* establishes limits on legislative power, it simply "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001). To preserve the balance of federal power, *Klein's* progeny have clarified that the Constitution is not offended when

Appendix D

Congress amends substantive federal law, even if doing so affects pending litigation. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Congress may "amend applicable law" in a way that impacts the outcome of a pending case without violating *Klein* (internal quotation marks omitted)); *see also Miller v. French*, 530 U.S. 327, 348-50 (2000) (finding no separation of powers issue where a statute "simply impose[d] the consequences of the court's application of the new legal standard"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (finding no separation of powers violation where a statute "amend[ed] [the] applicable law"). Although the line between a permissible "amendment" of the underlying law and an impermissible "rule of decision" remains unclear, federal statutes do not run afoul of *Klein* as long as they refrain from "direct[ing] any particular findings of fact or applications of law, old or new, to fact." *See Robertson*, 503 U.S. at 438.

One "sure precept" emerges from this legal thicket: "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coalition to Save Our Mall*, 269 F.3d at 1096. Yet because Congress may "impose new substantive rules on suits" that were not "resolved on the merits when Congress acted," courts faced with *Klein* challenges must tread lightly indeed. *See id.* at 1097.

Plaintiff argues that section 2(b) of the Gun Lake Act violates *Klein* because it mandates dismissal and, as a consequence, dictates a rule of decision. *See* Pl.'s Mem. at 26-32. Plaintiff is correct that dismissal has the same

practical effect as a judgment on the merits—it compels a favorable disposition for defendants. There is a difference, however, between a statute that dictates a particular decision on the merits, which *Klein* prohibits, and a statute that altogether withdraws jurisdiction to reach the merits, which *Klein* arguably does not preclude. *See Klein*, 80 U.S. at 146-47. The Gun Lake Act falls within the latter category. The Act does not mandate a particular finding of fact or application of law to fact. Instead, it withdraws this Court's jurisdiction to make any substantive findings whatsoever. Our Circuit Court considered—and rejected—a challenge to a similar statute, finding that a withdrawal of jurisdiction does not, by itself, violate *Klein*. *See Nat'l Coalition to Save our Mall*, 269 F.3d at 1097 (stating, without any detailed explanation, that the Act did not run afoul of *Klein*).

Congress's actions in this instance are more appropriately characterized as an effort to circumscribe the Court's jurisdiction. This, Congress most assuredly can do. The Constitution "gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Congress, as such, has plenary power to "define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That is precisely what happened here. Rather than dictate a particular outcome on the merits of plaintiff's case, Congress has legislatively restricted the Court's jurisdiction. I find nothing constitutionally repugnant in its exercise.

Appendix D

Plaintiff argues in the alternative that section 2(a) of the Act, which "reaffirm[s]" the Secretary's May 2005 decision to take the Bradley Tract into trust, violates *Klein* because it superimposes Congress's "own interpretation of the IRA without amending it."[6] *See* Pl.'s Reply at 31. Were Congress to issue such a dictate, it would surely invade the powers of the judicial branch. *See Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (opining that a statute presents constitutional problems if, rather than "*changing* the substantive law, [it] direct[s] the court how to *interpret* or apply pre-existing law"). The Court takes seriously, however, the invalidation of a Congressional action and applies the "cardinal principle" that "as between two possible interpretations of a statute by one of which it would be constitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (when faced with dueling interpretations, one of which "would raise serious constitutional problems," courts must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

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6. The Court is reluctant to opine on this particular argument, which plaintiff presented, for the first time, in his Reply brief. As this Circuit has emphasized, "[t]he premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Considering an argument advanced for the first time in a reply brief . . . entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *See McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (citations and internal quotation marks omitted).

While plaintiff has proffered one potential reading of the statute, section 2(a) can more plausibly be read in a way that does not raise constitutional concerns, *i.e.*, as an affirmance of agency rulemaking. Nowhere does the Act instruct this, or any other, Court to ratify the Secretary's action. Nor, for that matter, does it compel "any particular findings of fact or applications of law." *See Robertson*, 503 U.S. at 438. Simply put, Congress lent its imprimatur to the Secretary's decision, but stopped short of requiring the judiciary to do the same. Endorsements of this nature are hardly unprecedented and Congress has, on at least one occasion, retroactively validated agency actions taken on behalf of Native American Tribes. *See James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990) (upholding a statute that "*ratifies and confirms* [the Wampanoag Tribal Counsel's] existence as an Indian tribe" (emphasis added)); *see also Swayne & Hoyt Ltd. v. United States*, 300 U.S. 297, 301-02 (1937) (Congress may use its plenary power to "ratify [agency] acts which it might have authorized, and give the force of law to official action unauthorized when taken" (citations omitted)).

Given that the Act neither mandates a particular interpretation of the substantive law nor creates an impermissible rule of decision, I reject plaintiff's separation of powers challenge and turn to plaintiff's remaining constitutional arguments.

B. First Amendment Right to Petition

Plaintiff next argues that section 2(b) of the Gun Lake Act burdens his First Amendment Right to Petition the government. I disagree. The First Amendment protects the right of individuals "to petition the Government for a redress of grievances." U.S. Const. amend. I. The Right to Petition "is cut from the same cloth as the other guarantees of [the First] Amendment," and operates as "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Broad in scope, the right "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and guarantees, at a minimum, the right to seek redress from a federal decision-maker on the basis of a well-pleaded claim for relief, *see Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." (citation and internal quotation marks omitted)). Laws that "significant[ly] impair" this right must, like all substantial constitutional burdens, survive "exacting scrutiny." *See Elrod v. Burns*, 427 U.S. 347, 362 (1976).

Not all burdens are "significant" and although the First Amendment protects the right to speak, it does not ensure the right to speak to *all* tribunals. The distinction that emerges is narrow indeed. Congress may not foreclose a plaintiff's right to petition *all* decision-makers, but it may withdraw access to *some* decision-makers. *See Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 742

(1983) (invalidating a law that enjoined plaintiffs from filing "a meritorious suit" in state court). *But see Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 741 (D.C. Cir. 2011) (finding that a law did not violate the First Amendment because plaintiff could at least petition the agency for relief). Construing the Right to Petition more broadly would have far-reaching implications. Were it read to require access to all tribunals, the First Amendment would run headlong into another tenet of federal governance—Congress's power to "define and limit the jurisdiction of the inferior courts of the United States." *See Lauf*, 303 U.S. at 330. This, it does not do.

Plaintiff argues that the Gun Lake Act abridges his Right to Petition because it "prohibits the filing of any other lawsuit that challenges the federal Defendant's actions taking the Bradley Property into trust." *See* Pl.'s Mem. at 32. Defendants counter that although the Act enjoins filings in federal court, it does not bar plaintiff from pursuing other avenues of redress. *See* Mem. P. & A. Supp. United States' Opp'n Pl.'s Mot. Summ. J. at 22 [Dkt. #85]; Def.-Intervenor's Opp'n Pl.'s Mot. Summ. J. at 11-12 [Dkt. #86], I agree. Plaintiff may not be able to bring his claim before this Court, but he remains free to petition federal agencies, including the Department of the Interior, for relief. Nothing in the Act can be read to restrict such advocacy and this Court sees no reason to hold otherwise.

Plaintiff argues that this alternative is insufficient because any future complaints filed with the agency, whose decision Congress has ratified, "will fall upon completely

deaf ears." Pl.'s Reply at 32. The Department of the Interior may, indeed, be reticent to reverse its position. But nothing in the First Amendment entitles plaintiff to a favorable disposition of his claim. *See Am. Bus Ass'n*, 649 F.3d at 741 (refusing to find that Congressional interference with a plaintiff's potential remedies abridges the Right to Petition). The First Amendment safeguards only a citizen's right to *express* his grievance to a tribunal of competent jurisdiction. Nowhere does it "guarantee a citizen's right to receive a government response to or official consideration of a petition for redress of grievances" and I decline to find such an assurance. *See We the People Found. Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007). Accordingly, because nothing in the Petition Clause bars Congress from restricting, as it has, the forum for judicial review, I find that the Gun Lake Act does not violate the First Amendment.

C. Fifth Amendment Due Process

Plaintiff next argues that section 2(b) of the Act violates his Fifth Amendment due process rights because it requires dismissal without allowing him to fully litigate his claim. Pl.'s Mem. at 34-35. Due process challenges are governed by a two-part inquiry: "whether [plaintiff] was deprived of a protected property interest and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). A cause of action is considered a "protected property interest" only if a court has rendered "a final judgment" in that action. *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 43 (D.D.C. 2004), *aff'd*, 184 Fed. App'x 9 (D.C. Cir. 2006) ("Causes of actions only become actionable property interests upon the entry of final judgment.").

Plaintiff here argues that because the Supreme Court affirmed his standing to pursue this action, he has a property right protected by the Fifth Amendment. *See* Pl.'s Mem. at 35. Plaintiff is correct that his standing can no longer be challenged. However, he presents no authority—nor am I aware of any—to support the proposition that the ability to bring a lawsuit constitutes the type of vested property right that the Fifth Amendment due process clause protects.[7] It would be bold, to say nothing of unprecedented, to redraw the lines of property in such a fashion. Thus, in the absence of a cognizable property right, plaintiff's due process claim fails.

D. Bill of Attainder

Plaintiff's final constitutional attack to the Gun Lake Act lies in a Bill of Attainder. Article I, section 9 of the Constitution states that "[n]o Bill of Attainder . . . shall be passed." U.S. Const, art. 1 § 9, cl. 3. This provision prohibits Congress from enacting "a law that

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7. Even assuming, *arguendo*, that plaintiff has a property right in this action, he has arguably received all the process he is due. Congress has plenary power to grant, abridge, or revoke Article III jurisdiction. As the Supreme Court has held in welfare cases, which involve an analogous Congressional power to confer, and revoke, a public benefit, "[t]he procedural component of the Due Process Clause does not impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *See Atkins v. Parker*, 472 U.S. 115, 129 (1985) (citation and internal quotation marks omitted). In such instances, "the legislative process provides all the *process* that is constitutionally due" before Congress enacts a provision restricting litigants' judicial remedies. *See Am. Bus Ass'n*, 649 F.3d at 743.

legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). A law is thus a prohibited Bill of Attainder if it punishes a specific person or entity. *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998). To determine whether a statute imposes a punishment, courts assess: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute . . . reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." *Foretich v. United States*, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (quoting *Selective Serv. Sys.* v. *Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984)).

Although the Gun Lake Act applies specifically to suits involving the Bradley Tract, this alone is not problematic. *See Nat'l Coalition to Save Our Mall*, 269 F.3d at 1097 (finding a "[statute's] level of specificity to be unobjectionable"). Notwithstanding its specificity, the Gun Lake Act does not qualify as a Bill of Attainder for a second reason: it is not punitive. Jurisdiction stripping is simply not "punishment" in a historical sense—it does not impose a prison sentence, a fine, or any restriction that falls within the traditional "checklist of deprivations and disabilities" proscribed by the Constitution. *See Foretich*, 351 F.3d at 1218 ("This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions."). Nor was Congress's goal to disadvantage Mr. David Patchak. The Act's express purpose was to "provide

certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 113-194 at 2 (2014). The Act may have incidentally affected plaintiff's use and enjoyment of his property. But incidental burdens do not a punishment make. As such, plaintiff's final constitutional challenge is no more meritorious than his prior attacks.

Having rejected each of plaintiff's challenges, I find no constitutional obstacle to the enforcement of the Gun Lake Act and must decline, for want of jurisdiction, to reach the merits of plaintiff's APA challenge.

CONCLUSION

Accordingly, for all of the foregoing reasons, Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule is GRANTED, Intervenor-Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED. Finally, Plaintiff's Motion to Strike the Administrative Record Supplement is DENIED. This action is therefore DISMISSED. An Order consistent with this decision accompanies this Memorandum Opinion.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX E

CONSTITUTIONAL & STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

UNITED STATES CONSTITUTION, Article I, Section 1.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

UNITED STATES CONSTITUTION, Article III, Section 1.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Appendix E

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

UNITED STATES CONSTITUTION, Article III, Section 2.

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

UNITED STATES CONSTITUTION, Amendment V.

STATUTORY PROVISIONS

An Act

To reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

Appendix E

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Public Law 113–179, 128 STAT. 1914.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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No. 16-498

In the Supreme Court of the United States

DAVID PATCHAK, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner sought to challenge a decision by the Secretary of the Interior taking land into trust for an Indian tribe. While his suit was pending before the district court, Congress enacted legislation that reaffirmed the trust status of the land, ratified the Secretary's decision to the take the land into trust, and provided that "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land [at issue in this case] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2, 128 Stat. 1913 (2014). The district court dismissed petitioner's suit, and the court of appeals affirmed. The questions presented are:

1. Whether a statute that excludes a certain class of cases or controversies (including a pending case) from the jurisdiction of federal courts, but does not direct the court to make any particular findings or issue a judgment on the merits for a particular party, intrudes on the power of the judiciary contrary to separation-of-powers principles.

2. Whether the Act violates the Due Process Clause of the Fifth Amendment.

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2. Whether the Act violates the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 828 F.3d 995. The opinion of the district court (Pet. App. 27a-48a) is reported at 109 F. Supp. 3d 152.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2016. The petition for a writ of certiorari was filed on October 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, known as the Gun Lake Tribe (the Tribe), was formally recognized by the federal government in 1998, the Tribe asked the Department of the Interior to take a 147-acre property (the Brad-

ley Property) near the Township of Wayland, Michigan, into trust for the Tribe. See 70 Fed. Reg. 25,596 (May 13, 2005). The Secretary of the Interior (the Secretary) took the land into trust for the Tribe pursuant to authority granted by Congress in the Indian Reorganization Act, 25 U.S.C. 5108. See Pet. App. 31a-32a. The Tribe intended to use the property for gaming and built a casino there, which has now been in operation for several years. *Id.* at 32a.

Petitioner, a non-Indian who lives about three miles from the property, sought review of the Secretary's land-into-trust decision under the Administrative Procedure Act (APA), 5 U.S.C. 706. Petitioner alleged that the Secretary's land-into-trust decision violated 25 U.S.C. 5108 because the Tribe was not recognized by the federal government when the Indian Reorganization Act was enacted in 1934. Pet. App. 32a. He alleged injuries from expected increases in traffic and property taxes, as well as "an irreversible change in the rural character of the area" and a "weakening of the family atmosphere of the community." C.A. App. A19 ¶ 9; Pet. App. 4a.

The district court held that petitioner's alleged injuries were not within the "zone of interests" protected by Section 5 of the Indian Reorganization Act and dismissed petitioner's suit for lack of prudential standing. C.A. App. A171; see *id.* at A166-A175. The court of appeals reversed, 632 F.3d 702, and this Court affirmed the court of appeals' decision, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012). The Court held that petitioner had standing to challenge the legality of the Secretary's land-into-trust decision through an APA claim. *Id.* at 2208. The Court further held that peti-

tioner's suit was not precluded by 5 U.S.C. 702, which provides that the waiver of sovereign immunity contained in the APA "does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." *Patchak*, 132 S. Ct. at 2204 (citing 5 U.S.C. 702). Although the Quiet Title Act, 28 U.S.C. 2409a, which waives the United States' sovereign immunity for suits to adjudicate disputed title to real property in which the United States claims an interest, but "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a), the Court concluded that petitioner's suit was not a Quiet Title Act suit because he claimed no real-property interest in the Bradley Property. 132 S. Ct. at 2207-2208.

2. In *Patchak*, the United States argued that permitting suits such as petitioner's would pose significant barriers to Indian tribes' ability to promote investment and economic development on lands taken into trust by the Secretary. 132 S. Ct. at 2209. The Court stated that this argument was "not without force, but it must be addressed to Congress." *Ibid.* In 2014, after petitioner's case had been remanded to the district court, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. No. 113-179, 128 Stat. 1913. In relevant part, the statute provides:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the

> actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

§ 2, 128 Stat. 1913.

3. Following the enactment of the Gun Lake Act, the district court dismissed petitioner's suit. Pet. App. 27a-48a. The court explained that the "clear intent" of Congress was "to moot this litigation" and that, barring some constitutional infirmity in the Act, the court lacked jurisdiction over the case. *Id.* at 36a.

a. The district court rejected petitioner's argument that Section 2(b) of the Gun Lake Act violated the separation-of-powers principle of Article III of the Constitution. Pet. App. 37a-42a. The court acknowledged that in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court declined to give effect to a statute that "prescribe[d] [a] rule[] of decision" to the judiciary in a pending case. Pet. App. 38a. The court further explained, however, that this Court's cases applying the holding of *Klein* have clarified that "the Constitution is not offended when Congress amends substantive federal law, even if doing so affects pending litigation." *Id.* at 38a-39a (citing *Miller* v. *French*, 530 U.S. 327, 348-350 (2000); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)).

The district court concluded that Section 2(b) of the Gun Lake Act did not violate separation-of-powers

principles under this Court's cases. Pet. App. 39a. The court explained that the Gun Lake Act "does not mandate a particular finding of fact or application of law to fact," but instead "withdraws this Court's jurisdiction to make any substantive findings whatsoever." *Id.* at 40a. "This," the court concluded, "Congress most assuredly can do." *Ibid.*

b. The district court further rejected petitioner's contention that Section 2(a) of the Gun Lake Act, which "reaffirm[s]" and "ratifie[s]" the Secretary's land-into-trust decision, violates separation-of-powers principles by superimposing Congress's own interpretation of the Indian Reorganization Act, but without amending the statute. Pet. App. 41a-42a. The court explained that Section 2(a) did not instruct any court to ratify the Secretary's action or compel any findings of fact or applications of law. *Id.* at 42a. Although "Congress lent its imprimatur to the Secretary's decision," it "stopped short of requiring the judiciary to do the same." *Ibid.*

c. The district court rejected petitioner's argument that the Gun Lake Act violated the Due Process Clause by requiring the court to dismiss his suit "without allowing him to fully litigate his claim." Pet. App. 45a. The court concluded that petitioner did not have a protected property interest in his ability to bring a suit. *Id.* at 46a.

4. a. The court of appeals affirmed. Pet. App. 1a-22a. The court held that the Gun Lake Act did not encroach upon the judicial power in violation of separation-of-powers principles. *Id.* at 8a-12a. The court rejected petitioner's argument that Congress may only affect the outcome of pending litigation by "directly amend[ing] the substantive laws upon which the

suit is based." *Id.* at 9a. The court observed that this Court has rejected constitutional challenges to new legislation that "compelled changes in law" without directly amending the underlying statute. *Id.* at 9a-10a (quoting *Robertson*, 503 U.S. at 436-437, 440; *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318 (2016)). The court of appeals explained that Section 2(b) of the Gun Lake Act "provides a new legal standard [the court is] obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed." *Id.* at 11a-12a. The court concluded "that subject-matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn." *Id.* at 20a.

b. The court of appeals further concluded that the Gun Lake Act did not violate petitioner's due-process rights under the Fifth Amendment. Pet. App. 14a-16a. The court explained that, even assuming that petitioner had a property right to pursue his cause of action, "in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due." *Id.* at 15a.

ARGUMENT

Petitioner contends (Pet. 16-24) that the Gun Lake Act violates separation-of-powers principles protected by Article III of the Constitution by directing that petitioner's suit be dismissed. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of that claim is unwarranted. Petitioner further contends (Pet. 24-27) that the Gun Lake Act violates individual constitutional rights that are protected by principles of separation of powers. That contention lacks merit and was not pressed or passed upon below in its current form.

Further review of that claim is likewise unwarranted. The petition for a writ of certiorari should be denied.

1. a. Under the Constitution, Congress has broad power "to define and limit the jurisdiction of the inferior courts of the United States." *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That power includes the authority to withdraw jurisdiction previously given, and to subject pending cases to the new jurisdictional limitation. As this Court long ago explained, "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fail." *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Other decisions have applied that basic principle. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the rule that "when a law conferring jurisdiction is repealed without any reservations as to pending cases, all cases fall with the law"); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) (holding that "[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress").

Under those cases, Congress's withdrawal of federal court jurisdiction to review actions relating to the Bradley Property does not raise any constitutional issue under Article III. Instead, it falls well within Congress's recognized authority to "give, withhold or restrict [federal-court] jurisdiction at its discretion, provided it not be extended beyond the boundaries fixed by the Constitution." *Kline*, 260 U.S. at 234 (citing *Stevenson* v. *Fain*, 195 U.S. 165 (1904); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *Turner* v. *Bank of N.-Am.*, 4 U.S. (4 Dall.) 8, 10 (1799)).

Petitioner contends (Pet. 21 n.7) that the Gun Lake Act does not remove jurisdiction from the federal courts over actions relating to the Bradley Property. That argument is misguided. Section 2(b) states that any suit relating to the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed," 128 Stat. 1913, which can only be understood as an exercise of Congress's power to limit the lower courts' authority to review specific cases or controversies.[1] Petitioner contends (Pet. 21 n.7) that Congress should have used the term "jurisdiction" rather than "shall not be filed or maintained" if it wanted to eliminate the jurisdiction of the district courts over suits like petitioner's concerning the Bradley Property. But the case cited by petitioner explains

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[1] Cf. *Keene Corp.* v. *United States*, 508 U.S. 200, 208-209 (1993) (concluding that 28 U.S.C. 1500, providing that the Court of Federal Claims shall not have "jurisdiction" over certain claims, "continu[es] to bar jurisdiction" in the same manner as its predecessor statute, which provided that "[n]o person shall file or prosecute" such claims) (citation omitted).

that "maintain" can mean anything from "bring[ing]" or "fil[ing]" a claim to "continu[ing] to litigate" a claim, *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 (2003) (internal quotation marks omitted), which further demonstrates Congress's intent to capture cases in all procedural postures prior to final judgment and to require their dismissal or prohibit them from being filed.

b. Petitioner contends (Pet. 19) that Section 2(b) is similar to the statute at issue in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), which this Court declared unconstitutional under separation-of-powers principles. Petitioner's reliance on *Klein* is misplaced. In that case, Klein, the executor of an estate, sought to recover the value of property seized by the United States during the Civil War. The executor relied on a statute that authorized such a recovery upon proof that the decedent did not give aid and comfort to the enemy. *Id.* at 132-133. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court had held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and that if the claimant offered proof of a pardon, the court was required to dismiss the case for lack of jurisdiction. *Klein*, 80 U.S. (13 Wall.) at 133-134. This Court held that the statute "passed the limit which separates the legislative from the judicial power." *Id.* at 147. The Court explained that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. The Court concluded that Con-

gress had exceeded its authority by changing the effect of a Presidential pardon that had previously been granted. *Id.* at 148.

Although the Gun Lake Act and the statute in *Klein* both contain provisions directing federal courts to dismiss a certain category of cases, those provisions operate in different ways. In *Klein*, the Court explained that, "[u]ndoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect." 80 U.S. (13 Wall.) at 145. The problem in *Klein* was that other provisions of the statute mandated a rule of decision for the federal courts. The statute required courts to treat a Presidential pardon as proof of disloyalty and provided that whenever a judgment of the Court of Claims was based on a pardon, the Supreme Court would lose jurisdiction over the appeal. *Ibid.* The Court explained that the particular statute, which gave federal courts "jurisdiction * * * to a given point," but then required dismissal in certain factual circumstances, was "not an exercise of the acknowledged power of Congress to make exceptions * * * to the appellate power," but rather was a "denial of jurisdiction * * * founded solely on the application of a rule of decision." *Id.* at 146.

Unlike the statute in *Klein*, Section 2(b) of the Gun Lake Act eliminates a category of cases (cases relating to the Bradley Property) from the jurisdiction of the federal courts, regardless of what those cases are about or what the court in any pending case may have decided.

c. Furthermore, as the court of appeals correctly explained, the Court has clarified in subsequent cases that the Constitution is not offended simply because Congress has amended federal law in a way that affects pending litigation. For example, in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 438 (1992), the Court concluded that a statute enacted in response to pending litigation, which applied only to specific national forests in Washington and Oregon, posed no constitutional problem. *Id.* at 437. The statute provided that if an area of forests is managed in compliance with already-existing statutory provisions, that would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" specific cases pending in district courts within the Ninth Circuit. *Id.* at 435. The Court explained that the new provision "compelled changes in law, not findings or results under old law," and therefore was distinguishable from *Klein*. *Id.* at 438.

And in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016), the Court held that a statute that rendered a specific set of assets available to satisfy the liability and damages judgment underlying a specific enforcement proceeding (identified by docket number) did not violate separation-of-powers principles. *Id.* at 1317. The Court explained that Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." *Ibid.*; see *id.* at 1325. The Court also explained that the statute in *Klein* infringed the judicial power "because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe." *Id.* at 1324. Section 2(b) of the Gun Lake Act presents no

such problem, because Congress unquestionably has the power to alter the jurisdiction of the federal courts, which is what required dismissal of petitioners' suit.

Similar to *Robertson* and *Bank Markazi*, the Gun Lake Act does not "direct any particular findings of fact" or require "applications of law, old or new, to fact." *Robertson*, 503 U.S. at 438. Although the Gun Lake Act did not change an applicable legal standard that courts would then be required to apply to facts in a pending case, the statute changed the applicable law by ratifying the land-into-trust decision that petitioner challenged and by eliminating federal-court jurisdiction over suits relating to the Bradley Property. In the latter respect, it is similar to the statute at issue in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002), which was enacted while a case was pending in district court and provided that administrative decisions approving the location of the World War II Memorial in Washington D.C., "shall not be subject to judicial review." *Id.* at 1094 (citation omitted). In *Bank Markazi*, this Court cited *Norton* as an example of a "law[] that governed one or a very small number of specific subjects" and nevertheless was "upheld as a valid exercise of Congress's legislative power." 136 S. Ct. at 1328.

Moreover, *Robertson* and *Bank Markazi* refute petitioner's contention (Pet. 16-20) that Congress contravened the separation of powers by changing the law in a way that required dismissal of his suit, but without directly amending the APA or the Indian Reorganization Act. In both of those cases, Congress affirmed the constitutionality of new legislation that

affected pending litigation brought under other statutes, without imposing petitioner's proposed limitation on Congress's lawmaking authority. *Robertson*, 503 U.S. at 436-437; *Bank Markazi*, 136 S. Ct. at 1326.[2]

d. Petitioner contends (Pet. 15-16) that there is tension between the court of appeals' decision and the Ninth Circuit's decision in *Seattle Audubon Society* v. *Robertson*, 914 F.2d 1311 (1990), rev'd, 503 U.S. 429 (1992). According to petitioner, when this Court reversed the Ninth Circuit's decision in that case, it did not address the Ninth Circuit's holding that a law is unconstitutional under *Klein* if it directs a decision in a pending case without amending the underlying law. Petitioner points out that, after *Robertson*, the Ninth Circuit continued to read *Klein* to mean that Congress violates the separation of powers when it "direct[s] certain findings in pending litigation, without changing any underlying law." Pet. 16 (quoting *Gray* v.

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[2] Petitioner observes (Pet. 8, 9, 22) that the House and Senate Reports stated that the Gun Lake Act "will not make any changes in existing law," Pet. 8 (citing S. Rep. No. 194, 113th Cong., 2d Sess. 4 (2014)), but that language does not prove petitioner's point. This language was included in the Senate committee report pursuant to Rule XXVI(12) of the Standing Rules of the Senate, which requires the committee to provide a "comparative print" of any legislation that "repeal[s] or amend[s] any statute or part thereof." Standing R. of the S., R. XXVI(12) (2013). Basically identical language was included in the House Report for the same reason under applicable House rules. R. of the H.R., R. XIII(3) (2015). That language in the Reports thus indicates that the Gun Lake Act would not require the amendment of any other statute. The Gun Lake Act certainly did, however, change existing law by ratifying the Secretary's decision to take the Bradley Property into trust and by eliminating federal-court jurisdiction over certain types of suits.

First Winthrop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993)).

In each case petitioner cites, however, the Ninth Circuit concluded that Congress changed the underlying law. See *Ecology Ctr.* v. *Castaneda*, 426 F.3d 1144, 1149-1150 (2005) (concluding that statute at issue changed the underlying law); *Gray*, 989 F.2d at 1568-1570 (same). Petitioner thus has identified no case in which a statute was declared unconstitutional because it required a certain outcome in a case without amending the underlying law. And in any event, the Gun Lake Act did "supply new law," *Robertson*, 503 U.S. at 439, by ratifying the land-into-trust decision petitioner challenged and by eliminating federal-court jurisdiction over suits relating to the Bradley Property.

e. As petitioner concedes (Pet. 13), the Gun Lake Act is a statute of limited reach and does not present a question of nationwide importance. The Act affects only one parcel of land in Michigan, and its constitutionality has already been thoroughly examined by two federal courts. Petitioner contends (Pet. 12) that the threat to separation of powers is "particularly grave" where Congress acts with respect to one particular lawsuit. The Gun Lake Act, however, removes federal court jurisdiction over any suit involving the Bradley Property, not only the one brought by petitioner. In any event, as the Court recently explained in *Bank Markazi*, there is nothing inherently suspect about particularized legislation, and this Court and other courts have consistently "upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." 136 S. Ct. at 1328; cf. *Plaut* v. *Spendthrift*

Farm, Inc., 514 U.S. 211, 239 n.9 (1995) (laws may "impose a duty or liability upon a single individual or firm" without offending constitutional separation-of-powers principles).

Nor is petitioner correct (Pet. 16) that the Gun Lake Act is somehow constitutionally infirm because this Court previously held that petitioner's suit in particular "may proceed." *Ibid.* (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2203 (2012)). This Court held that petitioner had prudential standing and that his APA suit could therefore proceed, *Patchak*, 132 S. Ct. at 2210, given the state of the law at the time. But Congress has since enacted a statute that ratified the administrative decision petitioner challenged under the APA and bars judicial review of petitioner's claims by withdrawing federal-court jurisdiction over them. The APA expressly does not apply when a "statute[] preclude[s] judicial review." 5 U.S.C. 701(a)(1). Petitioner cites (Pet. 18-19) cases stating that Congress may not, consistent with Article III of the Constitution, revise or suspend a final judgment of a federal court. That principle is inapplicable here because petitioner never received a final judgment. Petitioner's suit was dismissed at the summary-judgment stage for lack of jurisdiction, following an interlocutory appeal on the question of his standing.

2. The court of appeals addressed only whether Congress could require dismissal of an APA challenge to the Secretary's land-into-trust decision through Section 2(b) of the Gun Lake Act and did not reach the merits of petitioner's underlying claims or the validity of Section 2(a) of the Gun Lake Act. Petitioner's discussion (Pet. 21-24) of whether Section 2(a) of the Gun

Lake Act "put the Bradley Property into trust" (Pet. 22), and his speculation about various legal questions such an action by Congress would raise, are therefore beside the point. Petitioner raised no challenge to the validity of Section 2(a) in the court of appeals, and Section 2(b) eliminates jurisdiction over petitioner's suit in any event.

Nor is there any occasion for this Court to grant review because the dismissal of petitioner's suit may foreclose the possibility of his receiving an "award of costs and reasonable attorneys' fees." Pet. 23. That is no more a basis for a writ of certiorari in this case than it would be in any case that is dismissed following an intervening change in the law. Even were petitioner's case to continue, he would not be entitled to attorneys' fees unless he ultimately were a "prevailing party." 28 U.S.C. 2412(d)(1)(A). And even if he prevailed, his claim for fees would be subject to defenses by the United States, including those that can result in the award of no fees. 28 U.S.C. 2412(d)(1)(B).

3. Finally, Section 2(b) of the Gun Lake Act poses no threat to petitioner's individual liberty interests or to any rights secured to him by the Fifth Amendment. In making those arguments (see Pet. 24-27), petitioner misstates the Gun Lake Act's purpose and effect. Petitioner asserts (Pet. 25) that Congress "arrogated to itself the judicial role of deciding [p]etitioner's APA claim." Section 2(b) of the Gun Lake Act, however, does not decide the merits of petitioner's APA claim or any other claims concerning the Bradley Property. Rather, it declares such claims to be outside the federal courts' jurisdiction and therefore leaves them unadjudicated. For the same reasons that Congress did not violate the separation of powers, see pp. 7-14,

supra, Congress did not infringe on any individual right petitioner may have to be free of congressional encroachment on the role of the judiciary. And under basic principles of sovereign immunity, petitioner has no property right to bring a suit against the United States.

Petitioner further contends (Pet. 26-27) that he has been subjected to disparate treatment in violation of his right to equal protection guaranteed by the Due Process Clause of the Fifth Amendment. *Ibid.* (citing *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954)). That argument "was not pressed or passed upon below" and therefore provides no basis for certiorari. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). In any event, the claim lacks merit. That the Gun Lake Act currently affects petitioner and no other claimant raises no constitutional concern unless the statute was "arbitrary or inadequately justified." *Bank Markazi*, 136 S. Ct. at 1327 n.27 (citing *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 305-306 (1976) (per curiam)). The Gun Lake Act is neither, having been explained in two congressional committee reports that provide valid legislative reasons for the statute's enactment.

The express purpose of the Gun Lake Act was to "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 194, 113th Cong., 2d Sess. 2 (2014). Economic certainty and the finality of governmental decisions are legitimate governmental purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RECORD AND BRIEFS

No. 16-498

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In The
Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

INTERVENOR-RESPONDENT MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913, which ratifies and confirms the status of a tract of land owned by the United States in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, and withdraws federal court jurisdiction over actions relating to such land, violates separation of powers principles under Article III of the Constitution.

2. Whether the Gun Lake Trust Land Reaffirmation Act deprives Petitioner of any right under the Due Process Clause of the Fifth Amendment.

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JURISDICTION

The judgment of the court of appeals was entered on July 15, 2016. The petition for a writ of certiorari was filed on October 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Gun Lake Tribe" or "Tribe") is a federally-recognized Indian tribe whose members descend from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish, and who occupied present day western Michigan. Although the United States entered into treaties with the Tribe and had a history of interacting with the Tribe on a nation-to-nation basis, the Tribe did not gain federal recognition under modern federal acknowledgment procedures until 1999. 25 C.F.R. §§ 83.1-83.46.

Because the Tribe lacked trust land for use as a reservation, in 2001, the Tribe petitioned the Secretary

of the Interior to acquire a 147-acre tract of land in Wayland Township, Michigan, known as the "Bradley Tract," for the benefit of the Tribe, pursuant to authority delegated to the Secretary by Congress in Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. The Department of the Interior approved the petition and announced its intent to acquire the Bradley Tract in trust for the benefit of the Tribe in 2005.

Petitioner, a private landowner residing several miles from the Bradley Tract, filed the present lawsuit in federal district court challenging the trust acquisition in 2008, invoking the court's jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 705. Petitioner argued that the Secretary lacked authority for the trust acquisition under the IRA because the Tribe was not formally "recognized" by the United States when the IRA was enacted in 1934.[1] The district court granted the Tribe's motion to intervene as a defendant.

After the district court denied Petitioner's motion for injunctive relief, the Secretary acquired title to the Bradley tract in trust for the benefit of the Tribe.

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[1] The Petitioner's claim was purportedly based on arguments originally rejected by the First Circuit in *Carcieri v. Kempthorne*, 497 F.3d 15, 21-22 (1st Cir. 2007) but later adopted by this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) ("We hold that the term 'now under Federal jurisdiction' in [the IRA] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."). The Department of the Interior has since concluded that the Gun Lake Tribe was both "recognized" and "under federal jurisdiction" when the IRA was enacted in 1934. See Pet. App. at 5a.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S.Ct. 2199, 2204 (2012) ("*Patchak I*"). The district court subsequently dismissed Petitioner's suit, holding, *inter alia*, that he lacked prudential standing. The Tribe then invested approximately $195 million to construct a gaming facility on the Bradley Tract.[2]

Petitioner appealed the district court's decision, and the D.C. Circuit reversed, holding that Petitioner had standing to bring this suit. This Court granted certiorari and affirmed the Court of Appeals' decision.[3] The case was then remanded to the district court for further proceedings.

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[2] The Tribe has been operating the gaming facility since February 2011 pursuant to a gaming compact with the State of Michigan entered into pursuant to the Indian Gaming Regulatory Act, 25 U.S.C.§§ 2701, *et seq*. The facility employs over 1,000 people, and as of September 2014, the Tribe had made over $52 million in revenue-sharing payments to state and local governments pursuant to its compact with the State of Michigan.

[3] Petitioner claims that this Court's decision in *Patchak I* was a "substantive ruling" that Patchak's case "may proceed." Pet. at i, 20. However, that decision merely established that Patchak had *standing* to bring the instant claim. A ruling that a party has standing simply means that the court *may* "decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 492 (1975). Moreover, "[j]urisdiction and standing are concepts distinct from each other," *Agilent Techs. v. Waters Techs. Corp.*, 811 F.3d 1326, 1330 (Fed. Cir. 2016), and this Court's 2012 *Patchak* decision on *standing* could not have addressed the issue of whether the courts below had *jurisdiction* to entertain Petitioner's suit in light of Congress' *2014* enactment of the Gun Lake Trust Land Reaffirmation Act.

Following this Court's decision, Petitioner inexplicably did not pursue his claim in the district court for nearly two years. In the meantime, the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 was introduced in Congress, underwent committee hearings and debate in both the House of Representatives and the Senate, and, prior to the district court's initial status conference on remand, Congress enacted the Act and President Obama signed the Act into law.

The Act ratifies and confirms the trust status of the Bradley Tract and withdraws federal court subject matter jurisdiction over actions related to the land.

The entire text of the Act is as follows:

> (a) In General – The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land and the actions of the Secretary are ratified and confirmed.
>
> (b) No Claims – Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

> (c) RETENTION OF FUTURE RIGHTS – Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Pub. L. No. 113-179, 128 Stat. 1913.

Through the Act, Congress sought to provide the Tribe with "certainty to the legal status of the land" that comprises the Tribe's reservation, upon which it relies for economic development, and which had been "place[d] in jeopardy" by the instant litigation. S. Rep. No. 113-194, at 2 (2014).

The parties submitted summary judgment briefing on both the effect of the Act and the merits of Petitioner's APA claim. The district court dismissed Petitioner's suit, holding that the Act divested it of jurisdiction to hear Petitioner's challenge and that it did not violate the Constitution.

The D.C. Circuit affirmed. *See* Pet. App. 1a-26a. The court held that the Act had stripped the lower federal courts of jurisdiction to consider the merits of Petitioner's complaint. The court of appeals further

rejected Petitioner's contention that the Act's withdrawal of jurisdiction conflicts with *United States v. Klein*, 80 U.S. 128 (1871).[4]

SUMMARY OF ARGUMENT

Congress enacted the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913, ("Gun Lake Act" or "Act") for the express purpose of providing "certainty to the legal status" of a tract of land that comprises the reservation of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Gun Lake Tribe" or "Tribe"), as the land had been "place[d] in jeopardy" by the instant litigation. S. Rep. No. 113-194, at 2 (2014). The Act did so first by ratifying and confirming the Secretary of the Interior's decision to acquire the land in trust for the benefit of the Tribe, and second by withdrawing the jurisdiction of the federal courts over any legal actions relating to the land.

By ratifying the land's trust status, Congress amended applicable law as a function of its constitutionally-derived plenary and exclusive power over Indian affairs, which includes the power to create and

[4] The court also rejected Petitioner's claims that the Gun Lake Act violated his First Amendment right to petition and his claim that the Act deprived him of property (his cause of action) in violation of his Fifth Amendment due process rights, and that the Act was an unconstitutional Bill of Attainder. See Pet. App. at 12a-20a. Petitioner has not challenged the court of appeals' rulings on these claims.

define Indian trust land. And by withdrawing federal court jurisdiction, Congress exercised its broad constitutionally derived power to define and limit the jurisdiction of the inferior courts.

This exercise of Congress' authority does not offend constitutional separation of powers principles, and is directly in line with this Court's recent decision in *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), as the D.C. Circuit recognized below.

Petitioner's claim that the Act violates his "right to have his claim adjudicated by a neutral judge, free from political interference," and that it "deprived Petitioner of his right to equal protection guaranteed by the Due Process Clause of the Fifth Amendment" was not raised below, and therefore is not properly before the Court.

Consequently, and as set forth herein, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. Petitioner's Contention that the Gun Lake Act Violates Constitutional Separation of Powers Does Not Warrant Review

a. Section 2(b) Was a Proper Exercise of Congress' Constitutional Authority to Limit the Jurisdiction of the Lower Federal Courts Pursuant to this Court's Prior Rulings

Petitioner's challenge to the Gun Lake Act's constitutionality derives solely from his objection to the effect of Section 2(b) of the Act. Pub. L. No. 113-179, 128 Stat. 1913. Specifically, he contends that Section 2(b) conflicts with *United States v. Klein*, 80 U.S. 128 (1871), because it withdraws federal court jurisdiction over a pending case. That argument is without merit and does not warrant review.

The Constitution grants Congress expansive power "to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *see also* U.S. Const. Art. III, § 2, cl. 1.[5] As a consequence of this power, Congress

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[5] Petitioner claims in a footnote that the Circuit Court mistakenly viewed the Gun Lake Act as removing the jurisdiction of the federal courts. (Pet. at 21 n.7.) *citing Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, 824 (2013). In that case, this Court stated that statutes must be treated as nonjurisdictional unless "clearly stated," but further stated that "[t]his is not to say that Congress must incant magic words in order to speak clearly." *Id.* Petitioner fails to explain how the prohibition of claims in Section 2(b) does not clearly express Congress' intent to withdraw jurisdiction.

may also withdraw existing jurisdiction and subject pending cases to the new jurisdictional limitation. It is well established that "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Importantly, "the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." *Id.* This Court has applied this general principle on numerous occasions. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly applied intervening statutes conferring or ousting jurisdiction" to pending cases); *Bruner v. United States*, 343 U.S. 112, 116-17 (1952) ("[W]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."); *Assessors v. Osbornes*, 76 U.S. 567, 575 (1869) (holding that jurisdiction "was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.").

Congress' withdrawal of federal court jurisdiction over actions related to the Bradley Tract does not run contrary to its Article III powers under the Constitution. To the contrary, pursuant to principles long recognized by this Court, the Act is squarely within

Congress' established power to withdraw jurisdiction from the lower federal courts and to direct the courts to apply the new jurisdictional limitation.[6]

Despite these clear constitutional principles, the Petitioner maintains that the Gun Lake Act violates constitutional separation of powers principles as discussed in *Klein*. This is not so. In *Klein*, the executor of the estate of a Confederate sympathizer sought to recover the value of property seized by the United States during the civil war under a statute that allowed recovery if the decedent had not aided in the rebellion. *United States v. Klein*, 13 Wall. 128 (1871). The Supreme Court held in a separate case that a presidential pardon satisfied the burden of proving that no aid had been given. *Id.* While *Klein*'s case was pending, Congress enacted legislation that provided that if a claimant had been offered a presidential pardon as proof that he had not given aid, it would instead be construed as proof of the opposite, and the case must be dismissed for lack of jurisdiction. *Id.* at 133-34. This Court held that the statute was unconstitutional as it "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it[.]"

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[6] Significantly, the Act's withdrawal of jurisdiction over actions relating to the Bradley Tract was among the less intrusive powers that Congress could have exercised to provide security over this tract of land. Pursuant to this Court's decisions in *Miller v. French*, 530 U.S. 327, 348 (2000) and *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. 421 (1885), Congress could have vacated an injunction barring the Secretary from taking the land into trust.

Id. at 146. *Klein* concluded that Congress had overreached its authority by changing the effect of a presidential pardon that had previously been granted. *Id.* at 148.

Klein does not hold that statutes that withdraw jurisdiction from a pending case violate constitutional separation of powers principles. To the contrary, this Court in *Klein* held that Congress had improperly directed the court to give an effect to a presidential pardon that was contrary to the effect that this Court had already decided such a pardon should have. *Id.* at 146. The Gun Lake Act does not suffer these same defects, as it does not direct the federal courts to make any substantive ruling on the merits of Patchak's claims; instead, it merely withdraws the lower courts' jurisdiction to entertain any claims related to the Bradley Tract.

Petitioner does nothing to dispute the settled principles first pronounced by this Court in *Klein*, which the Court of Appeals properly stated and applied. Thus the error Petitioner asserts merely consists of the "misapplication of a properly stated rule of law," and is not worthy of this Court's review. Sup. Ct. R. 10.

B. Section 2(a) Was a Proper Exercise of Congress' Constitutional Authority to Amend the Underlying Substantive Law

Petitioner does not raise any challenge here to the constitutionality of Section 2(a) concerning the ratification and confirmation of the Bradley Tract's trust status. Consequently, whether the validity of that section warrants review is not before this Court. Petitioner claims, however, that the court of appeals incorrectly held that Section 2(a) amended the substantive law applicable to Petitioner's claims.

In addition to Congress' clear power to exercise its authority to define jurisdiction in this case, the Constitution has also granted Congress "plenary and exclusive" authority to legislate with respect to Indian affairs in the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 and the Treaty Clause, U.S. Const. Art. II, § 2, cl. 2. *United States v. Lara*, 541 U.S. 193, 200 (2004). As a consequence, the power to acquire Indian lands lies "exclusively in Congress . . . , and any executive power over Indian lands must be traced to Congressional delegation of its authority." *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942). It is, therefore, Congress' constitutional prerogative to create and define Indian trust land as a direct exercise of its own plenary authority, although it has delegated some of that power to the Secretary of the Interior in the Indian Reorganization Act. *See id.*; *see also* 25 U.S.C. §§ 462, *et seq*. Further, when Congress ratifies

and confirms actions of the Executive Branch regarding Indian affairs, as it did here, this Court has held that it does so "as the exercise . . . of its 'plenary power . . . to deal with the special problems of Indians that is drawn both explicitly and implicitly from the Constitution itself.'" *Antoine v. Washington*, 420 U.S. 194, 204 (1975).[7] Congress' authority, therefore, necessarily encompasses the power to define and create trust land as a function of its plenary power under the Constitution, by ratifying and confirming a land acquisition undertaken by the Secretary of the Interior pursuant to her delegated authority. *See id.*

Recent decisions, including this Court's recent decision in *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), have made clear that "*Klein* does not inhibit

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[7] Petitioner contends that the meaning of the terms "ratified and confirmed" are unclear (Pet. at p. 21), but this Court in *Antoine* has explained the long history and meaning of these terms. *Antoine*, 420 U.S. at 200. Reviewing the Indian statutes that "ratified and confirmed" Executive action, this Court explained that with regard to Indians, "[o]nce ratified by Act of Congress, the [actions of the Executive branch] become law, and like treaties the supreme law of the land." *Antoine*, 420 U.S. at 204. Therefore, contrary to Petitioner's argument at Pet. pp. 21-24, "ratification and confirmation" constitutes a change in the law. Further, such ratification necessarily has a retroactive effect. *See id.* Even if it did not, Petitioner's additional argument, raised for the first time here, that he should be entitled to a ruling on the Secretary's authority to take the land into trust notwithstanding the present trust status of the land, would violate the rule against advisory opinions. *See, e.g., Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) ("For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'") (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)).

Congress from 'amend[ing] applicable law.'" *Id.* at 1323 (*quoting Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992)); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). *Bank Markazi* is particularly instructive here as it demonstrates the very settled nature of this principle.

In *Bank Markazi*, victims of Iran-sponsored acts of terrorism sought to enforce judgments obtained by default, seeking turnover of $1.75 billion in bond assets allegedly owned by Bank Markazi. An existing statute had empowered the President to determine which assets of this nature would be subject to execution of judgment pursuant to exceptions in the Foreign Sovereign Immunities Act of 1976. In a 2012 Executive Order, the President exercised these powers to delineate which assets in Iranian financial institutions would be subject to execution of judgment, but the scope of the Executive Order was contested. Congress, therefore, enacted a freestanding statute, not an amendment to the existing statutory scheme, that rendered the bond assets sought by the victims subject to execution. 22 U.S.C. § 2772(a)(1). The statute specifically identified the caption and case number of the ongoing proceeding in federal court and required that the assets subject to the statute meet criteria that matched the particular assets at issue. *Bank Markazi*, 136 S.Ct. at 1319-20.

This Court held that the statute did not violate the principles set forth in *Klein*, holding that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending cases" where

Congress has amended applicable law, even where legislation is specifically directed at a particular case. *Id.* at 1323-25. The Court explained that the statute at issue "did not simply amend pre-existing law," *id.* at 1325, it had "changed the law by establishing new standards" clarifying "that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets." *Id.* Further, its power to do so was clearly within Congress' prerogative despite the fact that it had delegated some of that authority to the Executive. *Id.* at 1328-29.

The Court of Appeals properly concluded that *Bank Markazi* controls this case, and that the Gun Lake Act does not violate constitutional separation of powers principles. As in *Bank Markazi*, Congress enacted a statutory scheme pursuant to its constitutional authority (here, its plenary authority over Indian affairs). It delegated some of that authority to the Executive. The Executive exercised that authority in a manner that was contested by Petitioner in litigation. Congress asserted its authority to establish a new legal standard applicable to Petitioner's claims, first, "[t]hrough its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust" and, second, through "its clear withdrawal of subject matter jurisdiction in Section 2(b)." (Pet. App. at 11a.)

Indeed, the Gun Lake Act is far less intrusive on the powers of the judiciary than the statute at issue in *Bank Markazi*. In the Gun Lake Act, Congress established a new legal standard by establishing the land's

trust status, a clear function of its plenary authority over Indian affairs, separate and apart from any litigation. The *Bank Markazi* statute, on the other hand, established a new standard as to what assets are subject to execution of judgment, a standard that can only apply to a judicial proceeding.

Petitioner fails to distinguish the Court of Appeals' decision from *Bank Markazi*. Thus his claim that "[t]his case presents an important opportunity for the Court to clarify the boundaries" of Congress' authority vis-à-vis constitutional separation of powers is without merit. Pet. at 13 (*citing* Sup. Ct. R. 10(c)).

C. The Decision Below Does not Conflict with Any Other Circuit Court Decision[8]

Petitioner's contention that the Court of Appeals' decision is in tension with the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson*, 914 F.3d 1311 (9th Cir. 1990), *rev'd, Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) is incorrect.

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[8] The narrow applicability of the Gun Lake Act also establishes a basis for denial of certiorari in this matter, as it does not present the type of "important question of federal law" warranting review. Sup. Ct. R. 10(c). This Court long has held that a writ of certiorari is only warranted "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . ." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79-80 (1955) (*quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

Petitioner claims that the D.C. Circuit's decision has interpreted *Klein* differently than the Ninth Circuit's decision in *Audubon Society*, wherein it held that "a statutory provision directing decisions in pending cases without amending any law [is] unconstitutional." Pet. Br. at p. 15 (*citing Seattle Audubon Society*, 914 F.3d 1311). This well-established interpretation of *Klein* does not differ from the Court of Appeals' formulation below. (Pet. App. at pp. 8a-9a.) ("Congress may not direct the result of pending litigation unless it does so by supply[ing] new law.") (*quoting Robertson*, 503 U.S. at 439). More importantly, this Court affirmed this basic principle again in *Bank Markazi*, thus nullifying Petitioners' Circuit-conflict-basis for granting certiorari. *Bank Markazi*, 136 S.Ct. at 123 ("*Klein* does not inhibit Congress from "amend[ing] applicable law."). Accordingly, this case should not warrant this Court's attention based on any asserted conflict between Circuit Court decisions.

II. Petitioner's Claim that the Gun Lake Act Has Deprived Him of Individual Rights Is Not Properly Before this Court and Should Not Be Reviewed

In a final section, Petitioner raises two issues that he did not raise below: (1) whether he was improperly stripped of his individual right to have his claim adjudicated by a neutral judge, free of political interference; and (2) whether the Gun Lake Act deprived him of his right to equal protection guaranteed by the Fifth Amendment's Due Process Clause.

The first issue was not raised below, and therefore is not properly before this Court. As this Court "ordinarily abstain[s] from entertaining issues that have not been raised and preserved in the court of first instance," it should not hear this claim. *See, e.g.*, *Wood v. Milyard*, 132 S.Ct. 1826, 1834 (2012). Even if it were properly before the Court, it would not warrant its review. Despite the fact that Petitioner frames this claim as related to the separation of powers issues, the argument is similar to Petitioner's failed claim below that the Gun Lake Act burdened his First Amendment right to petition. Pet. at 24-27. The Court of Appeals properly concluded that the right to petition is not an absolute right and is, more importantly, "subject to Congress' Article III power to define and limit the jurisdiction of the inferior courts of the United States." Pet. App. A at 13a (*citing inter alia McDonald v. Smith*, 472 U.S. 479, 484 (1985); *Lauf*, 303 U.S. at 330). Petitioner makes no argument to the contrary, and hence this claim does not warrant review.

Petitioner also did not make an equal protection argument based on the Fifth Amendment below, and so it should not be considered here. *See, e.g.*, *Wood*, 132 S.Ct. at 1834. Though Petitioner argued below that the Gun Lake Act deprived him of his alleged property right under the Fifth Amendment, the Court of Appeals rejected it, *inter alia*, because Petitioner could not make out a right that had been denied to him, as "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." Pet. App. A at 16a (*quoting N.Y. Cent.*

R.R. Co. v. White, 243 U.S. 188, 198 (1917)). Petitioner does not refute this aspect of the Court of Appeals' decision here, but instead raises a new equal protection claim that was not raised below. Review of this question is therefore not warranted.

CONCLUSION

The Petitioner's writ of certiorari should be denied.

November 11, 2016

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RECORD
AND
BRIEFS

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No. 16-498

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the
District of Columbia Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

"Time and again" the Court has "reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). And "[t]he leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 870 (1991).

Section 2(b) of the Gun Lake Act upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). It directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending any generally applicable statute. And it did so in order to overcome this Court's decision in *Patchak I*, and "void" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, after this Court expressly held that it "may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) (*"Patchak I"*).

Respondents' opposition briefs[1] defend the Gun Lake Act, but fail to dispute that if Congress is permitted to direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or

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[1] In this Reply, the Brief for the Federal Respondents in Opposition is cited as "FR Br." and the Intervenor-Respondent Tribe's Opposition is cited as "Tribe Br."

procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.

While Petitioner contends the Gun Lake Act should have been declared unconstitutional based on this Court's existing decisional law, the statute and the circumstances giving rise to it unquestionably test the limits of Congress's authority to act without intruding upon the judicial power. This case presents an important opportunity for the Court to clarify the boundaries of that authority. *See* SUP. CT. R. 10(c).

I. The Gun Lake Act Violates Separation of Powers Principles Regardless of Whether It is Properly Characterized as a Jurisdictional Statute

Respondents rely heavily on their contention that the Gun Lake Act is jurisdictional. While the statute violates separation of powers principles regardless of whether it is properly deemed jurisdictional, Respondents' contention is incorrect.

The Court has adopted a "bright line" test treating statutory limitations as nonjuridictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Regional Medical Center*, 135 S.Ct. 817, 824 (2013); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). This test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

Rather than address the Court's "bright line" test, Respondents ignore it—failing to even mention

Arbaugh or subsequent cases applying its holding.

The Gun Lake Act does not state (clearly or otherwise) that it is jurisdictional. To the contrary, the word "jurisdiction" does not appear anywhere in its title, headings or text. *Cf. Stern v. Marshall*, 564 U.S. 462, 479 (2011) ("we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such").[2]

Respondents also ignore the Gun Lake Act's legislative history which corroborates the statute is not jurisdictional. The House and Senate Reports each state the statute would not make any "changes in existing law." H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). The sections of the U.S. Code conferring subject matter jurisdiction over Petitioner's case were unaltered by the Gun Lake Act. *Cf. Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (subject matter jurisdiction concerns "the court's authority to hear a given *type* of case") (emphasis added).

But Respondents' argument about jurisdiction fails to address a more fundamental point: ***Section 2(b) of the Gun Lake Act would violate the***

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[2] Although Federal Respondents rely on *Keene Corp. v. United States*, 508 U.S. 200 (1993), the statute at issue there divested the Court of Federal Claims of jurisdiction using language that does not require mind-reading or imagination, stating the court "shall not have jurisdiction" over certain claims. *Id.* at 207. *Keene* reflects that Congress knows how to "clearly state" a statute is jurisdictional—which it did not do with the Gun Lake Act. And, as the Court noted in *Keene*, it has a "duty to refrain from reading a phrase into a statute when Congress has left it out." *Id.* at 208.

separation of powers even if the statute was ostensibly "jurisdictional." Congress's broad authority to define the jurisdiction of the federal courts must be exercised consistent with all of the Constitution's requirements—including its separation of powers principles. *See City of Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013) ("Congress has the power *(within limits)* to tell the courts what *classes* of cases they may decide.") (emphasis added); *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100, 125 (1981) ("Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress.") (Brennan, J., concurring). No case cited by Respondents establishes otherwise.[3] Nor have Respondents identified any decision from this Court holding that Congress's general power to alter the jurisdiction of the federal courts precludes finding a particular jurisdiction-stripping statute violates separation of powers principles. And *United States v. Klein*, 80

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[3] The cases cited by Respondents do not establish that the Gun Lake Act "does not raise any constitutional issue under Article III." FR Br. 7-8; *see also* Tribe Br. 9 (Act "does not run contrary" to Article III). None of those cases concerned or addressed the scope of Congress's power to eliminate jurisdiction when doing so would violate another constitutional provision. Moreover, most of the language they rely on appears in dicta, which "settles nothing." *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, --- S.Ct. ---- (2017). And Respondents rely on *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938), but overlook that in *City of Arlington* the Court cited *Lauf* after noting Congress's authority over jurisdiction exists "within limits." *City of Arlington*, 133 S.Ct. at 1868.

U.S. (13 Wall.) 128 (1871), directly refutes any such claim. There, the Court held that Congress had invaded the judicial power with a statute providing the Court "would have no further jurisdiction of the cause" and "shall dismiss the same for want of jurisdiction." *Id.* at 143. As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.[4]

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers," *Plaut*, 514 U.S. at 219, and deliberatively and decisively rejected legislative review of judicial decisions. This Court accordingly recognized long ago that "Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. 641, 648 (1874); *see also Hayburn's Case*, 2 Dall. 409, 413 (1792); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle

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[4] While conceding that *Klein* concerned an express congressional attempt to withdraw the Court's jurisdiction, Respondents downplay *Klein's* relevance to the Gun Lake Act on the ground that *Klein* involved not only Congress's exercise of judicial power, but also implicated the relationship between Congress and the President. *See* Tribe Br. 10-11; FR Br. 10. But *Klein* cannot plausibly be read to avoid the Court's clear holding that Congress had "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147; *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 7 (cautioning against reading *Klein* "simply as a case about the pardon power").

that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of the Government.").

When Congress directed the federal courts to "promptly dismiss" Petitioner's pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving v. United States*, 517 U.S. 748, 757 (1996). Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction does not permit it to exercise judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities.[5] And it is difficult to imagine a

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[5] Respondents claim the Gun Lake Act's "purpose" was to "provide certainty to the legal status of the [Bradley Property]," with Federal Respondents insisting that "[e]conomic certainty and the finality of governmental decisions are legitimate governmental purposes." FR Br. 17; Tribe Br. 6. While the Gun Lake Act certainly sought to settle "the legal status" of the property, its purpose was also to overcome "a U.S. Supreme Court opinion [*Patchak I*] that ha[d] allowed one individual to challenge the authority of the Secretary of Interior to take land into trust," and to "end" Petitioner's lawsuit. *Hearing on S.*

more direct invasion of the judicial power than occurred here. If Congress had the power to intervene and dictate the outcome of Petitioner's pending lawsuit by enacting the Gun Lake Act, then it has the same, seemingly unlimited, power with respect to any pending case.

Inclusion of Section 2(a) in the Gun Lake Act did not cure the profound separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced *new*, unsettled legal issues pertinent to Petitioner's APA case. *See* Pet. 23. However, with Section 2(b), Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts. *Cf. Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1323 (2016) (expressing "no doubt" Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it."); *Klein*, 80 U.S. (13 Wall.) at 146-47 (explaining "we do not at all question what was decided in" *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), where "the court was left to apply its ordinary rules to the new circumstances created by the act"); *see also* Brief of

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1603 Before the S. Comm. on Indian Affairs, S. Hrg. 113-509 at 55 (2014) (statement of David K. Sprague); *see also id.* at 9 (legislation was "to address *Patchak [I].*") (statement of Kevin Washburn); Pet. App. 36a (district court finding Congress had "a clear intent to moot this litigation"). The Gun Lake Act provided "certainty" only by "extinguish[ing] all rights to legal actions relating to the trust lands," S. Rep. No. 113-194, at 2-3 (2014), and "void[ing]" Petitioner's lawsuit. H. Rep. No. 113-590, at 2 (2014).

Federal Courts Scholars as Amici Curiae in Support of Petitioner at 18 ("even assuming *arguendo* that section 2(a) *did* change substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow that the change would be implemented by the *courts*").

II. The Court Must Guard Against Separation of Powers Violations, and this Case is an Ideal Vehicle to Clarify When Congress Has Infringed the Judicial Power

The Court should reject Federal Respondents' suggestion that the Petition be denied because "the Gun Lake Act is a statute of limited reach and does not present a question of national importance." FR Br. 14.

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Consistent with this responsibility, the Court frequently grants review when a serious separation of powers issue is presented—even though in many instances the Court ultimately concludes no violation has occurred. *See, e.g., Bank Markazi*, 136 S.Ct. 1310; *Miller v. French*, 530 U.S. 327 (2000); *Loving v. United States*, 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Freytag*, 501 U.S. 868; *Mistretta v. United States*,

488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).[6]

The invitation to look past a serious separation of powers issue because the offending statute has "limited reach" is at odds with this Court's recognition that "policing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of [its] most vital functions.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment)). It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington*, 133 S.Ct. at 1886 (Roberts, C.J., dissenting); *cf. SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, --- S.Ct. ---- (2017) (explaining relevance of "separation-of-powers principles" to the Court's conclusion that "applying laches within a limitations

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[6] Recognizing the importance of maintaining the separation of powers, the Court has granted review in numerous cases without the presence of conflicting lower court decisions. *See* Pet. 15 n.6 (citing cases). Respondents do not suggest the Petition should be denied due to an absence of conflicting lower court decisions. Nor do Federal Respondents appear to dispute (FR Br. 13-14) that the D.C. Circuit's decision below is in tension with the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), which held that a statutory provision directing decisions in pending cases without amending any law was unconstitutional under *Klein*, or that the Ninth Circuit has continued to rely on its reading of *Klein* after this Court's decision in *Robertson*, 503 U.S. 429. *See* Pet. 15-16.

period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power"). The Court "may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Association of American Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring).

Federal Respondents fail to recognize that "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503.

Federal Respondents' suggestion that the Gun Lake Act's "limited reach" warrants denial of the Petition also inappropriately disregards the critical role structural separation of powers principles play in safeguarding individual rights. *See Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well."); *Noel Canning*, 134 S.Ct. at 2593 (It is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t]

individual liberty.'") (Scalia, J., concurring) (quoting *Bond*, 564 U.S. at 223).

The protection of individual liberty advanced by separation of powers principles would be substantially undermined if the Court embraced the notion that only violations affecting large numbers of individuals warrant attention.[7]

CONCLUSION

"It is not every day that [the Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. [The Court] should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles

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[7] The Petition explained that Section 2(b) deprived Mr. Patchak of his right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. Pet. 26-27. Respondents contend that argument was not "pressed or passed upon below." FP Br. 17; Tribe Br. 17-19. While the language of equal protection was not explicitly addressed below, it is undisputed that Petitioner raised a Fifth Amendment challenge to the Gun Lake Act in both the district court and court of appeals (Pet. App. 14-16, 45-46)—and that the equal protection issue addressed in the Petition is rooted in the Fifth Amendment. Moreover, the equal protection argument addressed in the Petition is closely related to the other separation of powers issues presented given the role separation of powers plays in protecting individual liberty. The Court unquestionably has authority to address the equal protection argument if the Petition is granted. However, if the Court elects to address only the core separation of powers issues raised, the Petition could be granted with respect to Question 1 only. *See* Pet. at i.

over the politics of the moment." *Noel Canning*, 134 S.Ct. at 2617 (Scalia, J., concurring).

The Petition for a Writ of Certiorari should be granted.

April 2017

Respectfully submitted,

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AND
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No. 16-498

IN THE

Supreme Court of the United States

DAVID PATCHAK.,
Petitioner,
v.
SALLY JEWELL,
SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION PURSUANT TO RULE 37.2(b)

1. *Amici curiae* are eight law professors who teach and write in the field of federal jurisdiction, with a focus on the separation of powers.

2. *Amici* come together in this case out of a shared belief that the decision below, *see Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016), is in direct tension with the core separation-of-powers principles articulated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), even (if not especially) after this Court's clarification thereof in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016).

3. Pursuant to Rule 37.2(a), *amici* timely notified the only parties then listed on this Court's docket—Petitioner David Patchak and Respondents Sally Jewell et al.—of their intent to file a brief in support of Petitioner ("the Brief"), and received written consent from both parties, which has been lodged with the Court.

4. *Amici* timely filed the Brief on November 14, 2016.

5. On November 15, 2016, the Clerk's Office notified *amici* that they also needed to obtain the consent of Intervenor-Respondent Match-E-Be-Bash-She-Wish Band of Pottawatomi Indians—a party not then (or previously) listed on the docket for this case. Although Intervenor-Respondent *was* identified in the Petition, neither the Petition nor the Court's docket listed the identity or contact information of its counsel.

6. Counsel for *amici* immediately reached out to counsel for the Intervenor-Respondent (as identified by the Clerk's Office) to provide an electronic copy of the Brief and to request Intervenor-Respondent's consent.

7. Counsel for the Intervenor-Respondent refused to consent to the filing of the Brief, based upon both (1) a claim that the Brief does not satisfy Rule 37.1; and (2) the Intervenor-Respondent's failure to receive notice of the brief as outlined by Rule 37.2(a).

8. The Brief satisfies Rule 37.1 by offering analysis of the underpinnings of the *Klein* decision, its contemporary doctrinal and academic significance and controversy, and the analytical and theoretical implications of the Court of Appeals' ruling in this case. As the Brief amply demonstrates, *amici* have offered numerous arguments and lines of analysis not offered by Petitioner such that the Brief "brings to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37.1.

9. *Amici* concede that notice of their intent to file was not provided to Intervenor-Respondent within the time period set out by Rule 37.2(a), but note that all parties listed in the docket *did* timely receive notice—and consented to the filing of the Brief.

9. *Amici* respectfully request that this Court grant its motion for leave to file the Brief.

Respectfully submitted,

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November 16, 2016

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STATEMENT AND INTEREST OF *AMICI CURIAE*[1]

Amici listed in the Appendix are law professors who teach and write in the field of federal jurisdiction, with a focus on the separation of powers between the political branches and the judiciary. *Amici* come together in this case out of a shared belief that the decision below, *see Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016), is in direct and irreconcilable tension with the core separation-of-powers principles articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), even (if not especially) after this Court's clarification thereof last Term in *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

SUMMARY OF ARGUMENT

As all eight Justices in *Bank Markazi* agreed, *Klein* has stood—and stands today—as a vital bulwark of judicial independence vis-à-vis the political branches. And although the majority and the dissent in *Bank Markazi* disagreed over the *scope* of the *Klein* rule, the Court was unanimous that, at a minimum, "Congress could not enact a statute directing that, in 'Smith v.

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[1] This brief has been filed with the written consent of the parties which was timely requested. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Jones,' 'Smith wins.'" 136 S. Ct. at 1323 n.17; *see also id.* at 1334–35 (Roberts, C.J., dissenting).

But that is exactly what the statute at issue here—the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014)—does. Not only does the Gun Lake Act effectively direct a specific result in a pending suit (*after* this Court ruled that the suit should go forward) without amending substantive law, but, like the statute that this Court struck down in *Klein*, it further dictates to courts that the suit at issue "*shall* be promptly dismissed." *Id.* § 2(b), 128 Stat. at 1913 (emphasis added); *see also* Act of July 12, 1870, § 1, 16 Stat. 230, 235 ("[I]n all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, . . . the Supreme Court shall, on appeal, have no further jurisdiction of the cause, *and shall dismiss the same* for want of jurisdiction." (emphasis added)).

As *Bank Markazi* reflects, disagreement persists among courts and commentators (including *amici*) concerning the contemporary doctrinal contours and theoretical underpinnings of *Klein*. But there is also widespread agreement about certain core principles—principles that the Gun Lake Act violate. "[H]owever difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there being such a line," *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J., dissenting). And if the Court of Appeals is correct that the Gun Lake Act falls on the constitutional side of that line, then it really will be the case that, "[h]ereafter, with

this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases." *Id.* at 1338.

This Court "cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Stern v. Marshall*, 564 U.S. 462, 503 (2011); *see also id.* at 502–03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

Now more than ever, it is vital that this Court reaffirm such a foundational and fundamental principle of judicial power. For this reason, the writ of certiorari should be granted—and the decision below should be reversed.

ARGUMENT

I. An Act of Congress Violates the Separation of Powers When It Compels a Specific Judicial Outcome Without Amending Substantive Law.

This Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), has long provoked debate among Federal Courts scholars, who have offered a wide range of diverse and often conflicting interpretations of its meaning. But there has generally been widespread agreement that, whatever else *Klein*'s language and holding may entail, it stands at a minimum for the proposition that Congress may not direct the result in a pending case without amending the underlying law.[2]

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[2] *See, e.g.*, William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line*

Last Term's ruling in *Bank Markazi* reflects both the confusion over *Klein*'s contours and the consensus over its core. Thus, even in rejecting the claim that 22 U.S.C. § 8772 violated *Klein*, Justice Ginsburg's majority opinion was at pains to acknowledge the structural significance of the *Klein* rule—and the corollary that "Congress, no doubt, may not usurp a court's power to interpret and apply the law to the [circumstances] before it, for [t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." 136 S. Ct. at 1323 (alterations in original; quotation marks and citations omitted).

Although Congress may amend the law in ways that foreseeably affect pending litigation—as the *Bank Markazi* majority concluded that Congress provided in 22 U.S.C. § 8772, the general principle that Congress may not specifically direct a court how to rule on a pending case—even if it can tilt the scales decisively in one party's favor by amending substantive law—is foundational to judicial independence and the rule of law. And the Gun Lake Act plainly violates it.

Between Statutory Amendment and Statutory Interpretation, 48 Cath. U. L. Rev. 1055, 1079, 1088 (1999); Evan H. Caminker, Schiavo *and* Klein, 22 Const. Comment. 529, 533 (2005); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718-21 (1995); Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Sec. L. & Pol'y 251, 252–53 (2011); Howard W. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69-70 (2011).

A. *United States v. Klein* is best understood to forbid Congress from directing the result in a pending case without amending the underlying law.

During the Civil War, Congress enacted the Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863), which provided an opportunity for persons whose property was seized in the rebellious states to obtain the proceeds from sale of that property if they could prove that they had not "given any aid and comfort" to the rebellion. Shortly thereafter, President Abraham Lincoln issued a presidential proclamation offering a full pardon—including restoration of rights in seized property—to persons who had been engaged in the rebellion if they took a new loyalty oath.

Some years later, in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that a person taking such an oath and receiving a pardon would be deemed legally loyal, and therefore entitled to restoration of property under the Abandoned and Captured Property Act. The Reconstruction Congress, generally skeptical toward President Andrew Johnson's conciliatory policy toward the conquered South, responded by enacting a statute barring the use of a pardon to prove loyalty, taking a pardon to be conclusive proof that the claimant *had* been disloyal in fact, and instructing the federal courts to dismiss claims predicated on a pardon for want of jurisdiction.[3] As the statute provided,

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[3] *See generally* Wasserman, *supra* note 2, at 59-63; Amanda L. Tyler, *The Story of* Klein: *The Scope of Congress's*

> in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant on any other proof of loyalty than such as the proviso requires, this court shall, on appeal, have no further jurisdiction of the cause, *and shall dismiss the same for want of jurisdiction.*

Act of July 12, 1870, § 1, 16 Stat. 230, 235 (emphasis added).

This Court struck down that statute in *Klein*. The Court held that Congress's action was not a valid "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" of the Supreme Court. *Klein*, 80 U.S. (13 Wall.) at 146. Even though Congress may have broad power to restrict this Court's appellate jurisdiction,[4] Chief Justice Chase wrote that Congress may not "prescribe rules of decision to the Judicial Department . . . in cases pending before it." *Id.* Under the statute, "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely opposite." *Id.* at 147. By so requiring, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* Finally, the Court also suggested that by impairing the effect of a presidential pardon, the

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Authority to Shape the Jurisdiction of the Federal Courts, in *Federal Courts Stories* 106 (Vicki C. Jackson & Judith Resnik eds., 2009).

[4] The Court had decided *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), only three years previously.

law "infring[ed] the constitutional power of the Executive." *Id.*

It may be tempting to read *Klein* simply as a case about the pardon power, holding that Congress may not impair the full effect of a presidential pardon any more than it may restrict the President's other exclusive powers. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that Congress may not impair the President's exclusive power to recognize foreign nations). But Chief Justice Chase plainly raised the pardon issue only *after* identifying a standalone violation of Article III: Having found that the statute "passed the limit which separates the legislative from the judicial power," he observed that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." *Klein*, 80 U.S. (13 Wall.) at 147 (emphasis added); *see also Bank Markazi*, 136 S. Ct. at 1334 n.2 (Roberts, C.J., dissenting) (describing "*Klein*'s unmistakable indication that the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns"); Caminker, *supra* note 2, at 533 (observing that "the structure and language of the Court's opinion make clear that the two separation of powers principles discussed in *Klein* operate in the disjunctive").

As *Bank Markazi* instructs, *see* 136 S. Ct. at 1325–26, *Klein*'s language about "prescrib[ing] rules of decision" must be read in concert with numerous subsequent decisions holding that Congress may amend the law governing pending litigation, and that courts

must ordinarily give such amendments retroactive effect if Congress so intends.[5]

Klein itself recognized as much by distinguishing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). In May of 1852, the Court had held that the Wheeling Bridge was an impediment to navigation and ordered it removed. In August of the same year, however, Congress passed an act declaring that the bridge (as well as another bridge in Ohio) was a lawful structure and designating both as federal post roads. In the wake of this new statute, the Court acknowledged that its prior decree could no longer be executed, and it rejected any argument that the new law interfered with the judicial power. *See id.* at 431–32, 435–36.[6]

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[5] *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 212 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

[6] The *Wheeling Bridge* Court also emphasized that Congress's statute altered only the Court's prospective decree directing removal of the bridge. The Court suggested that the case would have come out differently had there been a claim for damages, *Wheeling Bridge*, 59 U.S. (18 How.) at 431, and in fact the Court did enforce the portion of its initial decree requiring the defendants to pay costs, *id.* at 436. But we think the critical aspect of *Wheeling Bridge* was that Congress had permanently, and for all legal purposes, altered the underlying legal status of the bridge.

The *Klein* Court found this decision perfectly consistent with its own holding. "No arbitrary rule of decision was prescribed in that case," Chief Justice Chase wrote, "but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 146–47. In *Klein* itself, by contrast, "no new circumstances have been created by legislation," *id.* at 147, all the more so in light of Congress's mandate that all matters implicating the statute "*shall* be dismissed"—language that contemplated no further judicial analysis.

To illustrate the narrowness of *Klein*'s core principle when read in conjunction with Congress's acknowledged power to change the underlying law, consider *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). There, the Court was asked to review the validity of the Northwest Timber Compromise, a federal statute modifying timber harvesting restrictions in forests home to the endangered spotted owl. The statute was enacted in response to ongoing litigation challenging whether the Bureau of Land Management had adequately considered the impact of permitted logging on the owl. As part of a compromise restricting logging in some areas and permitting it in others, § 318 of the statute designated particular portions of federal land, including that concerned in the ongoing litigation, as open to timber sales, and it mandated that management of the land pursuant to the law's new provisions would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the ongoing litigation, which it referred to by name and docket number. *See id.* at 433–34.

The Ninth Circuit had held that § 318 violated *Klein* because it directed the resolution of a pending case without amending the underlying law, but this Court reversed. Assuming that the court of appeals' reading of *Klein* had been correct, the Court nonetheless found that the statute "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. That conclusion, on *Robertson*'s facts, seems perfectly in line with *Klein*'s distinction of the *Wheeling Bridge* case: Congress's intervention exempted the specific provisions of the timber compromise from the general requirement that agencies consider environmental impacts.

And although the compromise had the effect of eliminating the legal basis for the plaintiffs' suit, the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise. Hence, "[t]o the extent that [the statute] affected the adjudication of the [pending] cases, it did so by effectively modifying the provisions at issue in those cases," *id.* at 440, leaving to *courts* the quintessentially judicial work of *applying* those substantive modifications to pending and future cases.

Although *Robertson* maintained *Klein*'s central distinction between directing law application and amending the underlying law, it illustrates that Congress may still achieve quite specific results when doing the latter, and those results may profoundly affect pending litigation. Critically, *Robertson* concerned the management of federal land, an exercise not of Congress's general Article I legislative powers but rather its Article IV power "to dispose of . . . property

belonging to the United States." U.S. Const. art. IV, § 3. Like statutes implicating foreign sovereign immunity, *see Bank Markazi*, 136 S. Ct. at 1328–29, decisions about the disposition of federal assets and resources are necessarily more targeted than general legislation, and it may be that Congress should be held to a stricter standard when it exercises its general legislative powers. But in any event, Congress's observance of the distinction between directing application and amending law maintains important separation of powers values.

B. Precluding Congress from directing results without changing the law serves important separation of powers values.

This Court's decision in *Robertson* did not expressly adopt the view that *Klein*'s prohibition turns on the difference between directing the outcome of a case and amending the underlying law; it assumed that the court of appeals had been correct in so reading *Klein* but found that the rule had not been violated. *See Robertson*, 503 U.S. at 441. But there is broad agreement among Federal Courts scholars that *Klein* must mean at least this much,[7] and *Bank Markazi* appears to confirm this view. *See* 136 S. Ct. at 1326. Whatever else, if anything, *Klein* may mean, its prohibition on directing results without amending the law serves critical values of judicial independence and integrity.

At least two sets of separation of powers values are salient in this context. The first concerns the protection of litigants from an adjudicative process dominated by majoritarian politics. When Congress amends the

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[7] See sources cited in note 2, *supra*.

underlying law, it necessarily deals with the subject of legislation in a more general way than when it simply directs the outcome of a pending case. Congress may be able to foresee the impact of the law on the present litigation, but it must also contemplate that, having been amended generally, the law may govern other unforeseen cases in the future. Even in *Robertson*, the specific mention of the pending cases in the statute was merely illustrative; the act's provisions nonetheless governed any other litigation that might arise concerning the affected timber sales.

The Founders were concerned that the early state legislatures had too often taken judicial matters into their own hands.[8] James Madison thus had this abuse, among others, in mind when he wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[9] Our Constitution requires the concurrence of multiple institutional actors before individuals may be deprived of liberty or property.[10] This forces legislators,

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[8] *See* Federalist No. 48, at 310-12 (Isaac Kramnick ed., 1987) (1788) (James Madison); *see also Plaut*, 514 U.S. at 221-22 (collecting sources); *INS* v. *Chadha*, 462 U.S. 919, 960-62 (1983) (Powell, J., concurring in the judgment) (same).

[9] Federalist No. 47, at 303 (Isaac Kramnick, ed., 1987) (1788) (James Madison).

[10] *See, e.g.*, *United States v. Brown*, 381 U.S. 437, 443 (1965) ("For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive

to at least some extent, to enact laws behind a veil of ignorance, knowing that those laws may well be applied to their own constituents or supporters.[11] And it assures individuals that when the law is actually applied to them, it will be in a judicial forum with all the procedural protections that such a forum affords.[12]

The second set of values involves the independence and integrity of the courts themselves. The judiciary's power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is the power to interpret and apply the applicable procedural and substantive law according to the court's own best judgment. *Changing* the applicable law does not intrude on that judgment.

But telling a court what outcome to reach, what legal conclusions to draw, or how to apply the existing law to facts *without* leaving room for exercises of judicial power compromises the independence and integrity of the courts. Judicial legitimacy rests critically on the neutral application of general principles. Herbert Wechsler famously said "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is

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implementation, no man or group of men will be able to impose its unchecked will.").

[11] *See, e.g., Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (explaining how the requirement that legislatures may not control to whom the laws will be applied prevents abuse of power).

[12] *See Chadha*, 462 U.S. at 966 (Powell, J., concurring in the judgment) (noting the lack of procedural safeguards when legislatures directly effect deprivations of rights).

involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[13] If Congress may require a court to reach a particular result, without providing a neutral principle on which to rest that decision, then little would remain of Professor Wechsler's notion.

Moreover, this threat to judicial integrity is also a threat to the mechanisms of accountability that ordinarily discipline the democratic process. Congress does not have the same obligation of principled decisionmaking that courts do. But Congress should not be able to evade democratic responsibility for the choices it makes by misrepresenting those choices as judicial decrees. As Henry Hart explained over a half-century ago,

> It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the former instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its deception, the harmful

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[13] Herbert L. Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

> consequences to that judicial integrity are far more significant.[14]

As Professor Hart suggested, Congress may seek to evade responsibility for its laws by contriving that they be announced as legal judgments. That undermines not only the integrity of the courts' decisional processes but also the operation of democratic accountability on the legislative side.

This Court has affirmed the institutional independence and integrity of the Article III courts in ringing terms in cases like *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 239 (1995), and *Stern*, 564 U.S. at 503. But it does little good to prevent Congress from reopening final judicial judgments or from reassigning decisionmaking responsibility to non-Article III courts if Congress may simply tell the Article III judiciary how to decide cases in the first place. *Cf. New York v. United States*, 505 U.S. 144 (1992) (holding that the Constitution prohibits Congress from dictating the content of *state* policy as a matter of federal law).

That is why scholars have interpreted *Klein* as insisting that "[t]he judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will

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[14] Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953); *see also* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 Geo. L. J. 2525, 2529 (1998) (arguing that *Klein* is directed toward preventing the "co-optation of the judiciary's national authority").

resist efforts to make it seem to support and regularize that with which it in fact disagrees."[15] In other words, if the judiciary interprets the preexisting law to require a particular outcome, it may not be required to reach the opposite conclusion unless that preexisting substantive law is duly changed.

C. *Klein*'s core holding survived *Bank Markazi*.

Although many of us (and two Justices) argued last Term in *Bank Markazi* that 22 U.S.C. § 8772 therefore violated the separation-of-powers principle at *Klein*'s core, a majority of this Court disagreed. But rather than entombing the *Klein* rule, *Bank Markazi* necessarily sharpened it—upholding § 8772 only because (1) "it directs courts to apply a new legal standard to undisputed facts," 136 S. Ct. at 1325; (2) "laws that govern[] one or a very small number of specific subjects" are not per se unconstitutional, *id.* at 1326; and (3) "§ 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper," *id.* at 1328.

So construed, *Bank Markazi* leaves intact the analytical core of the *Klein* rule: An Act of Congress that

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[15] Sager, *supra* note 14, at 2529; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. Rev. 437, 438-39 (2006) (reading *Klein* to forbid Congress from enlisting the judiciary in deceiving the electorate as to the actual state of the law).

does *not* "direct[] courts to apply a new legal standard to undisputed facts," but merely directs courts to rule in a particular manner on a pending case, runs afoul of the separation of powers. As *Klein* teaches, such a measure represents an exercise by the political branches of judicial—rather than legislative—power.

II. The Gun Lake Act Violates *Klein*.

Notwithstanding the above analysis, the Court of Appeals in this case—even with the benefit of *Bank Markazi*—concluded that the Gun Lake Act is consistent with *Klein*. As Judge Wilkins wrote for the panel,

> we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

Patchak, 828 F.3d at 1003 (citations omitted).

In other words, the Court of Appeals' conclusion that the Gun Lake Act permissibly "directs courts to

apply a new legal standard to undisputed facts" turns on two separate determinations: That section 2(a) altered the substantive law to be applied by courts to Petitioner's suit; and that section 2(b) did so, as well. Neither of these arguments, properly understood, withstands scrutiny.

First, with regard to section 2(a), it is hardly clear that Congress intended to *alter* substantive law, as opposed to simply *confirming* it. *See* Pet. 21–24. But even assuming *arguendo* that section 2(a) *did* change the substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow that the change would be implemented by the *courts*. As the majority stressed in upholding 22 U.S.C. § 8772 in *Bank Markazi*, the factual determinations required by the statute were not "mere fig leaves," for "it [was] quite possible that the [c]ourt could have found that defendants raised a triable issue as to whether the [b]locked [a]ssets were owned by Iran, or that [other parties] ha[d] some form of beneficial or equitable interest." 136 S. Ct. at 1325 (alterations in original; citations omitted).

Thanks to section 2(b) of the Gun Lake Act, however, the "new law" purportedly created by section 2(a) would benefit from no similar judicial construction; as soon as a court determines that an action "relat[es] to the land" described in section 2(a), it "shall be promptly dismissed." Given that there is no question that this case qualifies as such a suit, *see Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), the net effect of the Gun Lake Act is, as the proceedings below demonstrate, to compel a specific judicial result *without* any meaningful legal or

factual analysis of how any "new" law bears upon the merits. Put another way, section 2(b) prevents courts from asking the critical separation-of-powers question that *Klein* and its progeny require, *i.e.*, whether section 2(a) actually changes the substantive law.

Second, it hardly saves the Court of Appeals' analysis to assert that, instead of (or in addition to) section 2(a), section 2(b) of the Gun Lake Act constitutionally changes the law. Whether or not section 2(b) is properly characterized as "jurisdictional," *see* Pet. at 21 n.7, there can be no doubt that it confers no latitude or discretion upon the federal courts; on the contrary, it commands them to take a specific action—"dismissal"—in all cases related to the Bradley Property. Contrary to the Court of Appeals' analysis, section 2(b) does not "provide[] a new legal standard we are obliged to apply," *Patchak*, 828 F.3d at 1003; it dictates a specific legal *result* without any room for judicial construction other than the threshold determination that the case at bar falls within the statute's mandate of dismissal.

Indeed, the Gun Lake Act does not direct courts to apply a new legal standard to undisputed facts any more than the statute this Court invalidated in *Klein* did so. Instead, on the Court of Appeals' logic, the statute this Court struck down in *Klein* should itself have been upheld. After all, that statute also had two principal clauses—the substantive clause, which mandated that pardons be taken as conclusive proof of *dis*loyalty under the Abandoned and Captured Property Act; and the jurisdictional clause, which (unlike the Gun Lake Act) formally stripped the federal courts of jurisdiction over all claims under the Abandoned and Captured Property

Act turning on pardons—and then (like the Gun Lake Act) commanded the dismissal of any such pending cases.

By the D.C. Circuit's reasoning, the "change in law" central to the Court of Appeals' analysis was the precise "change in law" that this Court held to be unconstitutional in *Klein*. Unless *Klein* stands *only* for what has rightly been described as its "alternative" holding—that Congress cannot use its power over federal jurisdiction to negate the effect of powers vested exclusively in the President, *but see ante* at 7—then the Gun Lake Act must fall.

Finally, although the Gun Lake Act—and the ongoing dispute over the Bradley Property—may seem limited in scope to a specific set of facts, "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," this Court "cannot overlook the intrusion." *Stern*, 564 U.S. at 503. After all, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886). Now more than ever, the imperative for judicial reaffirmation of the *Klein* principle could not be stronger, and this case could not be a better candidate for such a ruling.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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RECORD AND BRIEFS

No. 16-498

Supreme Court, U.S.
FILED
JUL 12 2017
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 11, 2016
CERTIORARI GRANTED MAY 1, 2017

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RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT NO. 2015-5200

Date Filed	Docket Text
07/21/2015	US CIVIL CASE docketed. [15-5200]
07/21/2015	NOTICE OF APPEAL filed [1563558] by David Patchak seeking review of a decision by the U.S. District Court in 1:08-cv-01331-RJL. Assigned USCA Case Number [15-5200]
	***
12/07/2015	APPELLANT BRIEF [1587286] filed by David Patchak [Service Date: 12/07/2015] Length of Brief: 10,465. [15-5200] (Eubanks, Sharon)
	***
02/18/2016	APPELLEE BRIEF [1599553] filed by Carl J. Artman and Sally Jewell [Service Date: 02/18/2016] Length of Brief: 13,753 words. [15-5200] (McFadden, Lane)
	***

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02/19/2016	*CORRECTED* APPELLEE BRIEF [1599696] filed by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians [Service Date: 02/19/2016] Length of Brief: 13,953 words. [15-5200] (Schulte, Conly)
	***
03/07/2016	APPELLANT REPLY BRIEF [1602714] filed by David Patchak [Service Date: 03/07/2016] Length of Brief: 6,684. [15-5200] (Eubanks, Sharon)
	***
03/21/2016	*JOINT* APPENDIX [1604882] filed by David Patchak and Carl J. Artman, Sally Jewell and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. [Volumes: 1] [Service Date: 03/21/2016] [15-5200] (Eubanks, Sharon)
	***
03/28/2016	APPELLANT FINAL BRIEF [1605865] filed by David Patchak [Service Date: 03/28/2016] Length of Brief: 10,465. [15-5200] (Eubanks, Sharon)

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03/28/2016	APPELLANT FINAL REPLY BRIEF [1605866] filed by David Patchak [Service Date: 03/28/2016] Length of Brief: 6,684. [15-5200] (Eubanks, Sharon)
03/28/2016	APPELLEE FINAL BRIEF [1605882] filed by Carl J. Artman and Sally Jewell [Service Date: 03/28/2016] Length of Brief: 13,724 words. [15-5200] (McFadden, Lane)
03/28/2016	APPELLEE FINAL BRIEF [1605908] filed by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians [Service Date: 03/28/2016] Length of Brief: 13,899 words. [15-5200] (Ducheneaux, Nicole)
	***
05/13/2016	ORAL ARGUMENT HELD before Judges Rogers, Pillard and Wilkins. [15-5200]
07/15/2016	PER CURIAM JUDGMENT [1624906] filed that the decisions of the District Court appealed from in this cause are hereby affirmed, for the reasons in the accompanying opinion . Before Judges: Rogers, Pillard and Wilkins. [15-5200]
07/15/2016	OPINION [1624907] filed (Pages: 19) for the Court by Judge Wilkins. [15-5200]

07/15/2016	CLERK'S ORDER [1624908] filed withholding issuance of the mandate. [15-5200]
09/07/2016	MANDATE ISSUED to Clerk, U.S. District Court. [15-5200]
10/13/2016	LETTER [1642038] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 10/13/2016 as No. 16-498. [15-5200]
05/01/2017	LETTER [1673479] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in case No. 16-498: The motion of Federal Courts Scholars for leave to file a brief as amici curiae is granted. The petition for writ of certiorari was granted limited to Question 1 presented by the petition on 05/01/2017. [15-5200]

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (WASHINGTON, DC) CIVIL DOCKET FOR CASE #: 1:08–CV–01331–RJL

Date Filed	#	Docket Text
08/01/2008	1	COMPLAINT against DIRK KEMPTHORNE, CARL J. ARTMAN (Filing fee $350, receipt number 4616014126) filed by DAVID PATCHAK. (Attachments: # 1 Civil Cover Sheet)(jf,) (Entered: 08/05/2008)
		***
08/19/2008	13	MOTION to Intervene by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Memorandum in Support, # 2 Declaration of Chairman David K. Sprague, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit J, # 13 Exhibit K, # 14 Exhibit L, # 15 Exhibit M, # 16 Exhibit N, # 17 Exhibit O, # 18 Exhibit P, # 19 Exhibit Q, # 20 Exhibit Proposed Answer, # 21 Text of Proposed Order) (jf,) (Entered: 08/22/2008)

Appendix A

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08/28/2008		MINUTE ORDER granting 13 MOTION to Intervene by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. It is hereby ORDERED that the unopposed motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b) is GRANTED and it is hereby further ORDERED that movant is permitted to intervene as a defendant in this matter. Signed by Judge Richard J. Leon on 08/28/2008. (lcrjl1) (Entered: 08/28/2008)
08/28/2008	14	ANSWER to 1 Complaint by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. Related document: 1 Complaint filed by DAVID PATCHAK.(jf,) (Entered: 08/29/2008)

***

10/06/2008	19	MOTION for Judgment on the Pleadings by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Exhibit News Article, # 2 Exhibit Meeting Minutes, # 3 Text of Proposed Order) (Schulte, Conly) (Entered: 10/06/2008)

10/06/2008	20	MOTION to Dismiss for Lack of Jurisdiction by DIRK KEMPTHORNE, CARL J. ARTMAN (Attachments: # 1 Memorandum in Support, # 2 Certificate of Service)(Allery, Gina) (Entered: 10/06/2008)

***

10/17/2008	23	MOTION to Stay by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Exhibit Exhibits 1-9, # 3 Text of Proposed Order, # 4 Certificate of Service)(Marzouk, Tobey) (Entered: 10/17/2008)
10/17/2008	24	Memorandum in opposition to re 20 MOTION to Dismiss for Lack of Jurisdiction, 19 MOTION for Judgment on the Pleadings filed by DAVID PATCHAK. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibits 5-7, # 5 Exhibit Exhibit 8, # 6 Exhibit Exhibit 9, # 7 Text of Proposed Order Order-Motion to Dismiss, # 8 Text of Proposed Order Order-Motion for Judgment on Pleadings, # 9 Certificate of Service)(Marzouk, Tobey) (Entered: 10/17/2008)

***

10/27/2008	28	REPLY to opposition to motion re 20 MOTION to Dismiss for Lack of Jurisdiction filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Exhibit, # 2 Text of Proposed Order, # 3 Certificate of Service)(Allery, Gina) (Entered: 10/27/2008)
10/27/2008	29	Memorandum in opposition to re 23 MOTION to Stay filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Declaration, # 2 Text of Proposed Order, # 3 Certificate of Service)(Allery, Gina) (Entered: 10/27/2008)
10/27/2008	30	REPLY to opposition to motion re 19 MOTION for Judgment on the Pleadings filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit A - City of Tacoma v Andrus Order)(Schulte, Conly) (Entered: 10/27/2008)
10/27/2008	31	Memorandum in opposition to re 23 MOTION to Stay filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Affidavit Decl of Sprague, # 2 Exhibit A - Ampro Site,

3 Exhibit B - MichGO v Kempthorne 4-29-08 Decision, # 4 Exhibit C - Mtn to Supplement Issues, # 5 Exhibit D - MichGO v Kempthorne 3-19-08 Order, # 6 Exhibit E - MichGO v Kempthorne 7-25-08 Order, # 7 Exhibit F - Petition, # 8 Exhibit G - 23 Is Enough Supporters, # 9 Errata H - 6-13-05 News Article, # 10 Exhibit I - 2-24-07 News Article, # 11 Exhibit J - 2-25-07 News Article, # 12 Exhibit K - 9-05 Letter from Boorsma, # 13 Exhibit L - Patchak Campaign Ad, # 14 Exhibit M - Amicus Brief, # 15 Exhibit N - Wayland Meeting Minutes, # 16 Exhibit O - Wayland Meeting Minutes, # 17 Text of Proposed Order) (Schulte, Conly) (Entered: 10/27/2008)

***

11/06/2008 33 REPLY to opposition to motion re 23 MOTION to Stay filed by DAVID PATCHAK. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Errata Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Certificate of Service)(Marzouk, Tobey) (Entered: 11/06/2008)

Appendix A

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11/13/2008		MINUTE ORDER denying 23 MOTION to Stay by DAVID PATCHAK. It is hereby ORDERED that the motion is DENIED. Signed by Judge Richard J. Leon on 11/13/2008. (lcrjl1) (Entered: 11/13/2008)

***

01/08/2009	36	MOTION for Temporary Restraining Order/*Preliminary Injunction* by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Certificate of Notice and Compliance With Locai Rule 65.1(a), # 3 Text of Proposed Order, # 4 Certificate of Service, # 5 Exhibit 7, # 6 Exhibit 8, # 7 Exhibit 9, # 8 Exhibit 1, # 9 Exhibit 2, # 10 Exhibit 3, # 11 Exhibit 4, # 12 Exhibit 5, # 13 Exhibit 6)(Marzouk, Tobey) (Entered: 01/08/2009)
01/08/2009	37	RESPONSE *to Plaintiff's re 36 MOTION for Temporary Restraining Order/Preliminary Injunction Request for Emergency Hearing filed* by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly) . (Entered: 01/08/2009)

Appendix A

***

11/06/2008	40	Memorandum in opposition to re 36 MOTION for Temporary Restraining Order/*Preliminary Injunction* filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Affidavit, # 2 Certificate of Service) (Allery, Gina) (Entered: 01/09/2009)

***

01/14/2009	44	REPLY to opposition to motion re 36 MOTION for Temporary Restraining Order/*Preliminary Injunction* filed by DAVID PATCHAK. (Attachments: # 1 Certificate of Service)(Marzouk, Tobey) (Entered: 01/14/2009)

***

01/23/2009	46	Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)* by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Marzouk, Tobey) (Entered: 01/23/2009)

01/23/2009	47	Memorandum in opposition to re 46 Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)*Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)* filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Attachment A (Opposition To Plaintiff's Second Motion For Injunctive Relief)) (Ahn, Demian) (Entered: 01/23/2009)
01/23/2009	48	REPLY to opposition to motion re 46 Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)*Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary*

Appendix A

		Restraining Order/Preliminary Injunction (with Certificate of Service) filed by DAVID PATCHAK. (Marzouk, Tobey) (Entered: 01/23/2009)
		***
01/26/2009		Minute Entry for proceedings held before Judge Richard J. Leon. Motion Hearing held on 1/26/2009. MOTION 36 for Temporary Restraining Order filed by DAVID PATCHAK - Heard and Denied. Motion for 36 Preliminary Injunction filed by DAVID PATCHAK - Taken Under Advisement. (Court Reporter Patty Gels.) (kc) (Entered: 01/26/2009)
		***
03/02/2009	50	ORDER that the plaintiff shall submit in writing within 21 days of this Order a memorandum addressing whether this Court retains subject matter jurisdiction in this case in light of the Quiet Title Act, 28 U.S.C. 2409a(a); and it is further ORDERED that defendants and defendant-intervenor shall each have 14 days after service of plaintiff's memorandum in which to file a response, if any. Signed by Judge Richard J. Leon on 2/27/09. (see order.) (kc) (Entered: 03/02/2009)

03/20/2009	51	MEMORANDUM re 50 Order, by DAVID PATCHAK. (Attachments: # 1 Exhibit Argument Transcript Excerpt)(Courtade, Bruce) (Entered: 03/20/2009)
04/02/2009	52	MOTION for Summary Judgment by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Exhibit Exhibit 1, # 3 Text of Proposed Order, # 4 Certificate of Service)(Courtade, Bruce) (Entered: 04/02/2009)
04/06/2009	53	RESPONSE re 51 MEMORANDUM re 50 Order, filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order) (Allery, Gina) Modified as to correct docket text on 4/7/2009 (jf,). (Entered: 04/06/2009)
04/06/2009	54	MEMORANDUM in support of re 51 MEMORANDUM re 50 Order, by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Ahn, Demian) Modified as to the correct docket text on 4/7/2009 (jf,). (Entered: 04/06/2009)

04/07/2009	55	MOTION to Stay *Briefing on Plaintiff's Motion For Summary Judgment* by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Text of Proposed Order)(Schulte, Conly) (Entered: 04/07/2009)
04/09/2009		MINUTE ORDER granting 55 MOTION to Stay Briefing on Plaintiff's Motion For Summary Judgment by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. It is hereby ORDERED that the motion is GRANTED and it is further ORDERED that briefing on plaintiff's 52 motion for summary judgment is STAYED pending the Court's resolution of the pending 19 motion for judgment on the pleadings and 20 motion to dismiss for lack of jurisdiction. Signed by Judge Richard J. Leon on 4/9/2009. (lcrjl1) (Entered: 04/09/2009)
08/20/2009	56	MEMORANDUM OPINION. Signed by Judge Richard J. Leon on 8/19/09. (kc) (Entered: 08/20/2009)

08/20/2009	57	ORDER REVERSED PURSUANT TO USCA MADATE FILED 4/28/11.....ORDER denying Motion 36 for TRO; denying Motion 41 for Order; denying Motion 46 for TRO; denying Motion 52 for Summary Judgment and granting Motion 19 for Judgment on the Pleadings and granting Motion 20 to Dismiss for Lack of Jurisdiction. ORDERED that this case be DISMISSED with prejudice. SO ORDERED. Signed by Judge Richard J. Leon on 8/19/09. (kc) Modified on 5/2/2011 (zsmm). Modified on 5/2/2011 (zsmm). (Entered: 08/20/2009)
09/15/2009	58	NOTICE OF APPEAL as to 57 Order on Motion for TRO, Order on Motion for Order,, Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion to Dismiss/Lack of Jurisdiction,,,,,, by DAVID PATCHAK. Filing fee $455, receipt number 0090000000001961103. Fee Status: Fee Paid. Parties have been notified. (Courtade, Bruce) (Entered: 09/15/2009)

09/16/2009		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 58 Notice of Appeal, (jf,) (Entered: 09/16/2009)
09/22/2009		USCA Case Number 09-5324 for 58 Notice of Appeal, filed by DAVID PATCHAK. (jf,) (Entered: 09/23/2009)
01/08/2010	59	ORDER of USCA as to 58 Notice of Appeal, filed by DAVID PATCHAK; USCA Case Number 09-5324. Upon consideration of the motion to dismiss in part, the response thereto, and the reply, it is ORDERED that the motion to dismiss in part be referred to the merits panel to which this appeal is assigned. The parties are directed to address in their briefs the issues presented in the motion to dismiss in part rather than incorporate those arguments by reference. The Clerk is directed to enter a briefing schedule. (kb) (Entered: 01/08/2010)

***

04/28/2011	61	MANDATE of USCA (certified copy) as to 58 Notice of Appeal, filed by DAVID PATCHAK; USCA Case Number 09-5324. ORDERED and ADJUDGED that the judgment of the District Court

appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date. (Attachments: # 1 Opinion)(zsmm) (Entered: 05/02/2011)

***

12/12/2011 63 ENTERED IN ERROR.....NOTICE *of Granting Petitions for Writs of Certiorari by Supreme Court* by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Schulte, Conly) Modified on 12/13/2011 (znmw,). (Entered: 12/12/2011)

***

07/17/2014 67 MOTION for Hearing *Status Conference* by DAVID PATCHAK (Edwards, Catharine) Modified event title on 7/18/2014 (znmw,). (Entered: 07/17/2014)

***

09/04/2014 Minute Entry: Status Conference held on 9/4/2014 before Judge Richard J. Leon: Parties shall file a Joint Proposed Briefing Schedule within

		ten (10) days of today's hearing. (Court Reporter Patty Gels) (tb,) (Entered: 09/05/2014)
09/22/2014		MINUTE SCHEDULING ORDER: It is hereby ORDERED that the parties shall abide by the following briefing schedule: (1) plaintiff shall file his Motion for Summary Judgment and intervenor-defendant shall file its Motion for Summary Judgment on res judicata, laches, and other defenses on or before 10/31/2014; (2) any and all oppositions to plaintiff's and intervenor-defendant's motions for summary judgment shall be filed on or before 12/4/2014; and (3) replies to the motions for summary judgment shall be filed on or before 12/18/2014. It is further ORDERED that oral argument on the motions will be set by the Court at a date to be determined. Signed by Judge Richard J. Leon on 9/22/14. (lcrjl2,) (Entered: 09/22/2014)
		***
10/09/2014	73	NOTICE OF SUPPLEMENTAL AUTHORITY by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, SALLY JEWELL (Attachments: # 1

Supplement Gun Lake Trust Land Reaffirmation Act)(Schulte, Conly) (Entered: 10/09/2014)

10/09/2014 74 NOTICE of *Response* by DAVID PATCHAK re 73 NOTICE OF SUPPLEMENTAL AUTHORITY (Edwards, Catharine) (Entered: 10/09/2014)

***

10/31/2014 78 MOTION for Summary Judgment by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Declaration Chairman Sprague, # 2 Text of Proposed Order)(Schulte, Conly) (Entered: 10/31/2014)

***

10/31/2014 80 MOTION for Summary Judgment by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Appendix, # 3 Text of Proposed Order)(Eubanks, Sharon) (Entered: 10/31/2014)

***

12/04/2014	84	Memorandum in opposition to re 80 MOTION for Summary Judgment filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit Tribe's Mot for Summary Judg, # 2 Exhibit Transcript)(Schulte, Conly) (Entered: 12/04/2014)

***

12/04/2014	86	Memorandum in opposition to re 80 MOTION for Summary Judgment *(CORRECTED)* filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit Tribe's Mot for Summ Judg, # 2 Exhibit Transcript, # 3 Text of Proposed Order)(Schulte, Conly) (Entered: 12/04/2014)

***

12/18/2014	88	REPLY to opposition to motion re 80 MOTION for Summary Judgment filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly) (Entered: 12/18/2014)

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12/18/2014	90	REPLY to opposition to motion re 80 MOTION for Summary Judgment filed by DAVID PATCHAK. (Attachments: # 1 Appendix Part I, # 2 Appendix Part II, # 3 Appendix Part III, # 4 Appendix Part IV)(Edwards, Catharine) (Entered: 12/18/2014)

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06/17/2015	92	MEMORANDUM AND OPINION. Signed by Judge Richard J. Leon on 06/16/15. (tb) (Entered: 06/17/2015)
06/17/2015	93	ORDER: For the reasons set forth in the Memorandum Opinion entered this date; it is hereby ordered that plaintiff's 76 Motion to Strike the Administrative Supplement is DENIED; it is further ordered that Intervenor-Defendant's 78 Motion for Summary Judgment is GRANTED; it is further ordered that plaintiff's 80 Motion for Summary Judgment is DENIED; it is further ordered that plaintiff's 89 Unopposed Motion for Leave to File Excess Pages is GRANTED; and it is further ordered that this case be DISMISSED. Signed by Judge Richard J. Leon on 06/16/15. (tb) (Entered: 06/17/2015)

07/14/2015	94	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 93 Order on Motion to Strike, Order on Motion for Summary Judgment,, Order on Motion for Leave to File Excess Pages,,,,,,,, 92 Memorandum & Opinion by DAVID PATCHAK. Filing fee $505, receipt number 0090-4175484. Fee Status: Fee Paid. Parties have been notified. (Eubanks, Sharon) (Entered: 07/14/2015)
07/15/2015	95	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 94 Notice of Appeal to DC Circuit Court. (znmw) (Entered: 07/15/2015)
07/21/2015		USCA Case Number 15-5200 for 94 Notice of Appeal to DC Circuit Court, filed by DAVID PATCHAK. (md) (Entered: 07/21/2015)
		***
09/07/2016	97	MANDATE of USCA as to 94 Notice of Appeal to DC Circuit Court, filed by DAVID PATCHAK. USCA Case Number 15-5200. (Attachments: # 1 judgment filed July 15, 2016)(zrdj) (Entered: 09/07/2016)

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges.*

Argued May 13, 2016
Decided July 15, 2016

Opinion for the Court filed by Circuit Judge WILKINS.

Appendix B

WILKINS, *Circuit Judge*: David Patchak brought this suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, challenging the authority of the Department of the Interior to take title to a particular tract of land under the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The land, called the Bradley Property, had been put into trust for the use of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in Michigan, otherwise known as the Gun Lake Band or the Gun Lake Tribe.

Following the Supreme Court's determination in 2012 that Mr. Patchak had prudential standing to bring this lawsuit, *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), Congress passed the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014), a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, and removing jurisdiction from the federal courts over any actions relating to that property. Taking into account this new legal landscape, the District Court determined on summary judgment that it was stripped of its jurisdiction to consider Mr. Patchak's claim. Holding additionally that the Act was not constitutionally infirm, as Mr. Patchak contended, the District Court dismissed the case.

Mr. Patchak now appeals the dismissal of his suit, as well as a collateral decision regarding the District Court's denial of a motion to strike a supplement to the administrative record. For the reasons stated below, we affirm the District Court's determination that the Gun

Lake Act is constitutionally sound and, accordingly, that Mr. Patchak's suit must be dismissed. We further conclude that the District Court did not abuse its discretion by denying Mr. Patchak's motion to strike a supplement to the administrative record.

I.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Gun Lake Tribe) is an Indian tribe whose members descend from a band of Pottawatomi Indians, led by Chief Match-E-Be-Nash-She-Wish, who occupied present day western Michigan. *See Proposed Findings for Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 62 Fed. Reg. 38113, 38113 (July 16, 1997). While the Tribe had been a party to many treaties with the United States government in the 18th and 19th centuries, it only began pursuing federal acknowledgement under the modern regulatory regime of the Bureau of Indian Affairs, 25 C.F.R. §§ 83.1-83.46, in 1992. The Tribe was formally recognized by the Department of the Interior in 1999. In 2001, the Tribe petitioned for a tract of land in Wayland Township, Michigan — called the Bradley Property — to be put into trust under the IRA. The Tribe sought to use the land to construct and operate a gaming and entertainment facility. The Bureau of Indian Affairs approved the petition in 2005, placing the Bradley Property into trust for the Tribe's use. *See Notice of Determination*, 70 Fed. Reg. 25596, 25596 (May 13, 2005). The Gun Lake Casino opened on February 10, 2011.

Appendix B

David Patchak lives in a rural area of Wayland Township commonly referred to as Shelbyville, in close proximity to the Bradley Property. Mr. Patchak asserts that he moved to the area because of its unique rural setting, and that he values the quiet life afforded him there. Mr. Patchak filed the present lawsuit against the Secretary of the Interior and the Assistant Secretary of the Interior for the Bureau of Indian Affairs on August 1, 2008, invoking the court's jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 705. Mr. Patchak claimed that he would be injured by the construction and operation of a casino in his community because it would, among other things, irreversibly change the rural character of the area, increase traffic and pollution, and divert local resources away from existing residents. Mr. Patchak argued that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked the authority to put the Bradley Property into trust for the Gun Lake Tribe.[1] The Gun Lake Tribe intervened as a defendant.

In response to Mr. Patchak's complaint, the United States and the Tribe claimed that Mr. Patchak lacked prudential standing because his interest in the Bradley Property was "fundamentally at odds with the purpose

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1. Mr. Patchak's arguments on the merits of his claim rely heavily on the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), published after he initially filed his lawsuit. *Carcieri* interpreted part of the recognition provision of the IRA, 25 U.S.C. § 479. 555 U.S. at 387-93. Because we do not reach the merits of Mr. Patchak's claim in this appeal, we do not consider the impact of *Carcieri* in this case.

of the IRA" and he therefore did not fall within the IRA's "zone of interests." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The District Court agreed, and dismissed the complaint for lack of subject matter jurisdiction. *Id.* at 76, 79. Patchak appealed to this Court, and we reversed. *See Patchak v. Salazar*, 632 F.3d 702, 394 U.S. App. D.C. 138 (D.C. Cir. 2011). The Supreme Court agreed, holding that Patchak did indeed have prudential standing to bring his suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2212. The case was remanded to the District Court for further proceedings.

In the time between the Supreme Court's prudential standing determination and the parties' renewed attention to the case, both the Department of the Interior and Congress weighed in further on the legal status of the Gun Lake Tribe and the Bradley Property, respectively. First, the Department of the Interior issued an Amended Notice of Decision approving an application the Tribe had submitted for two other parcels of land it sought to acquire. As part of this Notice of Decision, the Secretary expressly considered, and confirmed, its authority to take land into trust for the benefit of the Gun Lake Tribe. Second, on September 26, 2014, President Obama signed the Gun Lake Act into law. The substantive text of the Gun Lake Act is as follows:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of

> the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.
>
> (c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Gun Lake Act § 2.

Shortly following the enactment of the Gun Lake Act, the parties filed motions for summary judgment. The District Court determined that, as a result of this legislation, it was now stripped of jurisdiction to consider Mr. Patchak's claim. *See Patchak v. Jewell*, 109 F. Supp. 3d 152, 159 (D.D.C. 2015). Rejecting Mr. Patchak's constitutional challenges to the Gun Lake Act, the District Court granted summary judgment in favor of the Government and the Tribe, and dismissed the case. *Id.* at 160-65. The District Court also denied Mr. Patchak's

Motion to Strike the Administrative Record Supplement, which had challenged the addition of the Amended Notice of Decision to the record before the court. *See* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). Mr. Patchak now appeals those decisions.

II.

The language of the Gun Lake Act makes plain that Congress has stripped federal courts of subject matter jurisdiction to consider the merits of Mr. Patchak's complaint, which undisputedly "relat[es] to the land described" in Section 2(a) of the Act. Gun Lake Act § 2(b). Accordingly, Patchak's suit "shall not be . . . maintained . . . and shall be promptly dismissed." *Id.* Of course, this is only so if the Gun Lake Act is not otherwise constitutionally infirm, as "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (citing RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 (4th ed. 1996)). The federal courts have "presumptive jurisdiction . . . to inquire into the constitutionality of a jurisdiction-stripping statute." *Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008).

Mr. Patchak's constitutional challenges to the Gun Lake Act are pure questions of law that we review *de novo*. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001).

Appendix B

A.

Mr. Patchak first argues that the Gun Lake Act encroaches upon the Article III judicial power of the courts to decide cases and controversies, in violation of wellestablished constitutional principles of the separation of powers. Article III imbues in the Judiciary "the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). This endowment of authority necessarily "blocks Congress from 'requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.'" *Id.* at 1322-23 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases. *See Bank Markazi*, 136 S. Ct. at 1325. Without question, "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Id.* This rule is no different when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096. It is well settled that "Congress has the power (within limits) to tell the courts what classes of cases they may decide." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Congress may not, however, "prescribe or superintend how [courts] decide those cases." *Id.* at 1869. Congress impermissibly encroaches upon the judiciary when it "prescribe[s] rules of decision" for a pending case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). In short, Congress may

not direct the result of pending litigation unless it does so by "supply[ing] new law." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992). Mr. Patchak argues that the Gun Lake Act did not provide any new legal standard to apply, but rather impermissibly directed the result of his lawsuit under pre-existing law.

These principles do not require, as Mr. Patchak suggests, that in order to affect pending litigation, Congress must directly amend the substantive laws upon which the suit is based. Indeed, Supreme Court precedent belies such a contention.

In *Seattle Audubon*, for example, the Supreme Court considered the impact of new legislation on pending cases challenging the federal government's efforts to allow the harvesting and sale of old-growth timber in the Pacific Northwest. 503 U.S. at 431. The legislation was the Northwest Timber Compromise, a provision of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989). *Id.* at 433. It established rules to govern the forest harvesting at issue in the pending consolidated cases, and spoke expressly to those suits — even identifying them by caption number. *Id.* at 433-35. If loggers complied with the new rules, Congress posited, they would thereby satisfy the statutory obligations on which the pending environmental litigation rested. *Id.* The Ninth Circuit held that the Northwest Timber Compromise unconstitutionally dictated the outcome of pending litigation without amending the underlying laws, but the Supreme Court disagreed. The Court held that the legislation effectively "replaced the legal standards

underlying the two original challenges . . . without directing particular applications under either the old or the new standards." *Id.* at 436-37. Because the provision "compelled changes in law," *id.* at 438, the Court concluded that the provision "affected the adjudication of the [specifically identified] cases . . . by effectively modifying the provisions at issue in those cases," *id.* at 440.

The Supreme Court's recent *Bank Markazi* decision likewise applied new legislation to pending litigation. That legislation did not directly amend or modify the particular statute upon which the pending litigation was based. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, 22 U.S.C. § 8772 (2012) had been passed in order "[t]o place beyond dispute" the availability of certain assets for satisfaction of judgments rendered in certain specifically identified terrorism cases. *Bank Markazi*, 136 S. Ct. at 1318. The statute was enacted as a freestanding measure, not as an amendment to the Foreign Sovereign Immunities Act of 1976 (FSIA) (which allows American nationals to file suit against state sponsors of terrorism in United States courts, *see* 28 U.S.C. § 1605A), or the Terrorism Risk Insurance Act of 2002 (TRIA) (which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of [a] terrorist party"). *Id.* Rejecting a challenge similar to the one Mr. Patchak pursues here — that the provision "did not simply amend pre-existing law," *id.* at 1325 — the Court held that "§ 8772 changed the law by establishing new substantive standards," *id.* at 1326. As the Court explained, "§ 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored

terrorist attacks will be permitted to execute against those assets." *Id.*

Our decision in *National Coalition to Save Our Mall* is also instructive. There, we considered a separation-of-powers challenge to a statute that withdrew from the federal courts subject matter jurisdiction to review challenges to specific executive decisions relating to the placement of the World War II Memorial on the National Mall. 269 F.3d at 1096-97. In rejecting that challenge, we emphasized that there is no "prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Id.* at 1096. And while this Court "express[ed] no view" on the question whether a court could do so without amending the substantive law on which a pending claim rested, we did note that the provision at issue (Public Law No. 107-11) "present[ed] no more difficulty than the statute upheld in [*Seattle Audubon*], as Public Law No. 107-11 similarly amend[ed] the applicable substantive law." 269 F.3d at 1097.

Consistent with those decisions, we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." *Bank Markazi*, 136 S. Ct. at 1326. More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action

relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

That this change has only affected Mr. Patchak's lawsuit does not change our analysis here, for Congress is not limited to enacting generally applicable legislation. Particularized legislative action is not unconstitutional on that basis alone. *See Bank Markazi*, 136 S. Ct. at 1327-28; *Plaut*, 514 U.S. at 239 n.9; *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1097. "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut*, 514 U.S. at 239 n.9.

In passing the Gun Lake Act, Congress exercised its "broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary." *Bank Markazi*, 136 S. Ct. at 1326.

B.

Mr. Patchak next asserts that the Gun Lake Act burdens his First Amendment right to petition. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). The Petition Clause "protects the right of individuals to appeal to courts and other forums established by the government

for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

The right of access to courts is, without question, "an aspect of the First Amendment right to petition the government." *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)); *see also Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 513 (1972). It is an important right, *see Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983), but it is not absolute, *see McDonald v. Smith*, 472 U.S. 479, 484 (1985). For example, an individual does not have a First Amendment right of access to courts in order to pursue frivolous litigation. *Id.* More to the point, the right to access federal courts is subject to Congress's Article III power to define and limit the jurisdiction of the inferior courts of the United States. *See* U.S. CONST. art. III, § 1; *cf. Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Ameur v. Gates*, 759 F.3d 317, 326 (4th Cir. 2014). Congress may withhold jurisdiction from inferior federal courts "in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

Moreover, the Gun Lake Act does not foreclose Mr. Patchak's right to petition the government in all forums; it affects only his ability to do so via federal courts. And while he argues that other forms of petition — such as seeking redress directly from the agency — would be futile, Patchak concedes that he is not entitled to a successful outcome in his petition, or even for the government to listen or respond to his complaints. Rightfully so. "Nothing

in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *see also We the People Found., Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007).

By stripping federal courts of subject matter jurisdiction over challenges to the status of the Bradley Property, Congress has made its determination as to what is "proper for the public good." *Palmore*, 411 U.S. at 401 (quoting *Cary*, 44 U.S. (3 How.) at 245). There is no constitutional infirmity here.

C.

Mr. Patchak also claims that the Gun Lake Act implicates his rights under the Fifth Amendment's Due Process Clause. The Fifth Amendment instructs that the federal government may not deprive individuals of property "without due process of law." U.S. CONST. amend. V. In order to determine whether there has been a violation of due process rights, we undertake a two-part inquiry: first, we must determine whether the claimant was deprived of a protected interest; and second, if the claimant was so deprived, we then consider what process the claimant was due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014).

Mr. Patchak identifies a potentially protected property interest in his unadjudicated claim. The Supreme Court has "affirmatively settled" that a cause of action is a species of property requiring due process protection. *Logan*, 455 U.S. at 428 (analyzing due process rights under the Fourteenth Amendment) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Surely so, as "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 430 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)). Once the legislature confers an interest by statute, it may not constitutionally authorize the deprivation of that interest without implementing appropriate procedural safeguards. *Id.* at 432.

But even assuming that there may be a property right to pursue a cause of action, in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due. As discussed above, the legislature has the power to change the underlying laws applicable to a case while it is pending and, as a result, to alter the outcome of that case. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096; *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (where "a law intervenes and positively changes the rule which governs, the law must be obeyed").

In *Logan*, the Supreme Court acknowledged that "[o]f course," a legislature "remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily-created causes of action

altogether—just as it can amend or terminate" benefits programs it has put into place. 455 U.S. at 432; *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 92 (1980) (Marshall, J., concurring) ("[T]he Due Process Clause does not forbid the 'creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929))). Indeed, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917). Accordingly, while a cause of action may be a "species of property" that is afforded due process protection, *Logan*, 455 U.S. at 428, there is no deprivation of property without due process when legislation changes a previously existing and still-pending cause of action, *id.* at 432. In such a circumstance, "the legislative determination provides all the process that is due." 455 U.S. at 433.

We have no reason to except the Gun Lake Act from this general approach. Congress made a considered determination to ratify the Department of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe, and further to remove any potential impediments to the finality of that decision. It did not violate Mr. Patchak's due process rights by doing so.

D.

Mr. Patchak's final constitutional challenge to the Gun Lake Act is that it constitutes an impermissible Bill of Attainder. *See* U.S. CONST. art. I, § 9, cl. 3. Under

this provision, Congress may not "enact[] 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)). A law is prohibited under the Bill of Attainder Clause if two elements are met: (1) the statute applies with specificity; and (2) the statute imposes punishment. *Id.* at 1217. We are able to resolve Mr. Patchak's challenge on the second element alone, because the Gun Lake Act is not punitive.

In order to decide whether a statute impermissibly inflicts punishment, we consider each case in "its own highly particularized context." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984) (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)). In so doing, we pursue a three-part inquiry:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment;
>
> (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and
>
> (3) whether the legislative record 'evinces a congressional intent to punish.'

Id. (quoting *Nixon*, 433 U.S. at 475-76, 478). These factors are considered independently, and are weighed together to resolve a bill of attainder claim. *See Foretich*, 351 F.3d at 1218. None of the three factors is necessarily dispositive, but this Court has noted that the second factor — what is called the "functional test" — "invariably appears to be the most important of the three." *Id.* (quoting *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998)).

Historically, laws invalidated as bills of attainder "offer[ed] a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [Article] I, § 9." *Nixon*, 433 U.S. at 473. "This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich*, 351 F.3d at 1218. Jurisdictional limitations are generally not of this type. *See Ameur*, 759 F.3d at 329 ("[J]urisdictional limits are usually not viewed as traditional 'punishment.'"); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) ("Jurisdictional limitations . . . do not fall within the historical meaning of legislative punishment."); *see also Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1253 n.9 (11th Cir. 2008) (declining to find that a "generally applicable jurisdictional rule" amounted to a bill of attainder in part because it "d[id] not impose punishment of any kind"); *Nagac v. Derwinski*, 933 F.2d 990, 991 (Fed. Cir. 1991) (jurisdictional limitation "d[id] not impose a punishment 'traditionally adjudged to be prohibited by the Bill of Attainder Clause'" (quoting *Nixon*, 433 U.S. at 475)).

The second prong of the inquiry, the "functional test," requires that the legislation have "a legitimate nonpunitive purpose" and that there is "a rational connection between the burden imposed and [the] nonpunitive purposes." *Foretich*, 351 F.3d at 1220-21. In other words, the means employed by the statute must be rationally designed to meet its legitimate nonpunitive goals.

The Gun Lake Act passes this test. The Gun Lake Act serves the legitimate nonpunitive purpose of "provid[ing] certainty to the legal status of the [Bradley Property], on which the Tribe has begun gaming operations as a means of economic development for its community." S. REP. No. 113-194, at 2 (2014). Congress accomplished this goal by affirming and ratifying the Department of the Interior's initial decision to put the land into trust for the Tribe in Section 2(a), but also by removing jurisdiction over matters relating to the land in Section 2(b). In point of fact, Congress's intended goal of providing certainty with respect to the trust land would have been impossible to achieve absent the termination of any outstanding litigation — specifically, Mr. Patchak's suit. The legislative history reflects an acknowledgement of this fact, noting that Mr. Patchak's suit "places in jeopardy the Tribe's only tract of land held in trust and the economic development project that the Tribe is currently operating on the land." *Id.* Whatever burden is imposed by Section 2(b), on Mr. Patchak or otherwise, the statute is rationally designed to meet its legitimate, nonpunitive purpose of providing certainty with respect to the trust land.

Finally, the legislative record does not evince a congressional intent to punish. Mr. Patchak has presented

no evidence, other than the acknowledgement that his case would be affected, for his claim that Congress purposefully targeted him for retaliation through the Gun Lake Act. While it may be true that Mr. Patchak was adversely affected as a result of the legislation, the record does not show that Congress acted with any punitive or retaliatory intent.

E.

The Government suggests that there is an alternative ground on which we could rule, arguing that the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity. While the Government did not make this argument in the proceedings below, sovereign immunity is a threshold jurisdictional question that speaks to the court's authority to hear a given case, and so we would be well within bounds to consider the question. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "Indeed, the 'terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Nevertheless, because we conclude that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn, we need not consider the matter further.

III.

In a separate challenge to the proceedings below, Mr. Patchak contends that the District Court erred by permitting the administrative record to be supplemented. We review the District Court's denial of Mr. Patchak's Motion to Strike the Administrative Record Supplement for abuse of discretion. *Cf. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

Although this case may not present circumstances typically permitting the agency to supplement the record, *see id.*, the District Court's failure to strike the supplemental information provided to it was not an abuse of discretion. The District Court denied Mr. Patchak's Motion to Strike Supplemental Record "[f]or the reasons set forth in the Memorandum Opinion" entered on the same date, *see* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). — *i.e.*, the District Court's determination, at issue in this appeal, that it was without jurisdiction to consider the suit and that the case was to be dismissed in its entirety, *Patchak v. Jewell*, 109 F. Supp. 3d 152 (D.D.C. 2015). The District Court only mentioned the record supplement in the Procedural Background section of its opinion in order to indicate the "events [that] have altered the legal landscape" in the time since the case was remanded from the Supreme Court. *Id.* at 158. The District Court did not abuse its discretion by referencing that development in this way. Nor did it abuse its discretion by denying a motion to strike a supplement to the record at the same time that it was dismissing the case in its entirety for lack of jurisdiction.

IV.

For the foregoing reasons, the District Court's decisions below are affirmed.

So ordered.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

September Term, 2015
Filed On: July 15, 2016

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*

Appendix C

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the decisions of the District Court appealed from in this cause are hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 15, 2016

Opinion for the court filed by Circuit Judge Wilkins.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, *et al.*,[1]

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

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1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the Court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior, for the former Secretary, Ken Salazar.

Appendix D

ORDER

For the reasons set forth in the Memorandum Opinion entered this date, it is this 16th day of June 2015, hereby

ORDERED that Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment [Dkt. #80] is **DENIED**; it is further

ORDERED that Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion to Strike the Administrative Record Supplement [Dkt. # 76] is **DENIED**; and it is further

ORDERED that this case be **DISMISSED**.

SO ORDERED.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX E

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,[1] *et al.*,

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

---

1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior for the former Secretary, Ken Salazar.

Appendix E

MEMORANDUM OPINION

(June 16, 2015) [Dkts. ##76, 78, 80, 89]

This case is before the Court on remand from the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States. Plaintiff David Patchak ("plaintiff") is challenging the Secretary of the Interior's ("Secretary") decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of the Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. In a Verified Complaint filed on August 1, 2008, plaintiff sought an injunction barring the Secretary from taking the land into trust, claiming that the Secretary lacked authority to do so under the IRA. Compl. ¶ 28 [Dkt. #1]. This Court dismissed the case for lack of standing on August 20, 2009. Mem. Op. [Dkt. #56]. Following remand by the Supreme Court, both parties filed motions for summary judgment. Presently before the Court are Plaintiffs Motion to Strike the Administrative Record Supplement [Dkt. #76], Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78], Plaintiff's Motion for Summary Judgment [Dkt. #80], and Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89]. Upon consideration of the parties' pleadings, the relevant case law, and the entire record herein, this Court DENIES Plaintiff's Motion to Strike the Administrative Record Supplement, GRANTS Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule,

DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Intervenor-Defendant's Motion for Summary Judgment.

BACKGROUND

This Opinion represents the latest chapter in plaintiff's quest to enjoin a gaming casino in Allegan County, Michigan. This case's history is, to say the least, lengthy, and the Court, for the sake of economy, recounts only those portions necessary to its holding.

I. Statutory Framework

Since the 1800s, Congress has enacted various statutes to regulate Indian affairs. One such initiative, the Indian Reorganization Act of 1934, was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage." *See* 1-1 Cohen's Handbook of Federal Indian Law § 1.05. Its animating purpose was therefore to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1973). To that end, the IRA authorizes the Secretary "to acquire . . . any interest in lands" on behalf of groups that meet the statutory definition of "Indians." *See* 25 U.S.C. § 465. The IRA defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[2] 25 U.S.C. § 479. Land

2. While the IRA does not elaborate on what it means to be a "recognized Indian Tribe now under Federal jurisdiction," the Supreme Court recently interpreted the word "now" to refer to the date of the IRA's enactment in June 1934. *Carcieri v. Salazar*, 555

acquired pursuant to the IRA "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired," 25 U.S.C. § 465, and may be designated as part of the Tribe's official reservation, *id.* at § 467.

Like the IRA, the Indian Gaming Regulatory Act of 1998 (the "IGRA") was enacted to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). To facilitate this goal, the IGRA provides "a statutory basis for the operation of gaming by Indian tribes," *id.*, and allows gaming on land that was taken into trust as part of the "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process," 25 U.S.C. § 2719(b)(1)(B). A tribe may be formally acknowledged if it can "establish a substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present." *See* 25 C.F.R. § 83.3(a).

II. Factual Background

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is now a federally-recognized Indian tribe. Compl. ¶ 18. But this was not always the case. The Tribe, though in existence for over two centuries, has endured a lengthy struggle for federal recognition. It was initially recognized by the federal government between 1795 and 1855, during which time it was party to no fewer than sixteen

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U.S. 379, 382 (2009). The Supreme Court left open the question of what constitutes "Federal jurisdiction."

treaties with the United States. Compl. ¶ 15; AR001987.[3] This recognition was, however, short-lived. Beginning in 1855, the Tribe fell victim to a slew of federal policies that divested the Tribe of both its ancestral lands and its sovereign status. *See* Compl. ¶¶ 16-17.

The Tribe remained dispossessed for much of the 20th century. *See* Compl. ¶ 16-18. In 1998, after decades of landlessness, the Tribe sought to reinstate its sovereign status under the modern federal acknowledgment procedures. Compl. ¶ 18. It succeeded. On October 23, 1998, the Secretary of the Interior proclaimed the Tribe an "Indian tribe within the meaning of Federal law," thus entitling the Tribe, and its members, to a bevy of federal protections. *See* 63 Fed. Reg. 56936-01 (1998).

In 2001, shortly after receiving federal acknowledgment, the Tribe identified a 147-acre tract of land in the Township of Wayland, Michigan, ("the Bradley Tract") that it wished to acquire as its "initial reservation" under the IRA. *See* AR001438. In its ensuing trust application, the Tribe requested permission to construct and operate a 193,500 square foot gaming and entertainment facility on the Bradley Tract. AR001445. The Tribe prevailed, and on May 13, 2005, the Department of the Interior issued a Notice of Final Agency Determination accepting the Bradley Tract into trust to "be used for the purpose of construction and operation of a gaming facility." 70 Fed. Reg. 25596-02 (May 13, 2005). In January 2009,

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3. References to "AR" correspond to the Administrative Record filed on October 6, 2008. *See* [Dkt. #21].

the Secretary formally acquired the Bradley Tract on the Tribe's behalf. Decl. Chairman David K. Sprague Supp. Intervenor-Def.'s Mot. Summ. J. ("Sprague Decl.") ¶ 14 [Dkt. #78-1]. Thereafter, the Tribe incurred approximately $195,000,000 in debt to develop the land. Sprague Decl. ¶ 18. Its efforts culminated in the opening of the Gun Lake Casino on February 10, 2011. Sprague Decl. ¶ 19.

III. Procedural Background

Plaintiff filed the present lawsuit on August 1, 2008 under section 702 of the Administrative Procedure Act ("APA"), arguing that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked authority to take the Bradley Tract into trust. Compl. ¶¶ 25-28. On August 19, 2009, I dismissed this action for lack of subject matter jurisdiction. Mem. Op. [Dkt. #56]. Plaintiff appealed to our Circuit Court, which reversed and held that plaintiff indeed had standing to pursue his action. *See Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). On June 18, 2010, the United States Supreme Court affirmed the Circuit Court's decision and remanded the case to this Court for adjudication on the merits of plaintiff's suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

Since this case was remanded, two events have altered the legal landscape. First, on September 3, 2014, the Secretary issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two other parcels of land it sought to acquire. SAR000617-

58.[4] In so doing, the Secretary expressly considered, and confirmed, its authority under the IRA to take land into trust on behalf of the Tribe. *See* SAR000650 ("The [Tribe] unquestionably was under federal jurisdiction prior to 1934. . . . [And] the [Tribe's] under federal jurisdiction status remained intact in and after 1934."). Second, on September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act" or "the Act"). Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b). The Act, which bears directly on the instant case, declares as follows:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b).

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4. References to "SAR" are to the Administrative Record Supplement. *See* [Dkt. #75].

Thereafter, on October 31, 2014, the parties filed motions for summary judgment. For the following reasons, the Court GRANTS Intervenor-Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

DISCUSSION

Plaintiff would have this Court disregard the Gun Lake Act and proceed directly to the merits of his challenge. I decline to do so. Because the Gun Lake Act purports to moot plaintiff's case, it is hard to see how it can be ignored. To disregard it entirely would, moreover, violate the usual principle that a court is to apply the law in effect at the time it rules. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

As a fallback position, plaintiff argues that the Act is void because it violates numerous constitutional provisions, including separation of powers principles, the First Amendment Right to Petition, Fifth Amendment Due Process, and the ban on Bills of Attainder. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Mem.") at 25-39 [Dkt. #80-1]. For the reasons discussed herein, I reject each of these arguments and find that the Gun Lake Act is constitutional and, further, that it moots plaintiff's case.

I. APA REVIEW

Federal courts are courts of limited jurisdiction and may not reach the merits of a case absent jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

83, 101 (1998). Plaintiff brings his suit pursuant to the Administrative Procedure Act, which entitles any person "adversely affected or aggrieved by [an] agency action" to judicial review. *See* 5 U.S.C. § 702. As the APA makes clear, there is a "strong presumption" of reviewability of agency decisions. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption, "like all presumptions," may "be overcome by . . . specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 673 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)); *see* 5 U.S.C. § 701(a) (limiting judicial review to the extent that a federal statute "preclude[s] judicial review" or the "agency action is committed to agency discretion by law"). Once that presumption is overcome, courts may venture no further into the merits of the case. "For a court to pronounce upon the meaning" of federal action when "it has no jurisdiction to do is, by very definition, for a court to act ultra vires." *See Steel Co.*, 523 U.S. at 101-02. Such is the case here.

Section 2(b) of the Gun Lake Act states that "no claims" regarding the Secretary's decision to take the Bradley Tract into trust shall be "maintained in a Federal court." *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Section 2(b) tracks, moreover, section 2(a)'s ratification of the Secretary's decision, leaving no doubt that Congress intended to have the final word. *See id.* This intent is born out in the legislative history. The House Committee on Natural Resources stated, for example, that the Act, if passed, "would void a pending lawsuit [by neighboring landowner David Patchak] challenging the

lawfulness of the Secretary's original action to acquire the Bradley Property." H.R. Rep. 113-590 (2014). The Senate Committee on Indian Affairs agreed that the Act "would prohibit any lawsuits" related to the "lands taken into trust by the Department of the Interior (DOI) for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in the state of Michigan." S. Rep. 113-194 at 3 (2014). Taken together, the Act's plain language and legislative history manifest a clear intent to moot this litigation. Barring some constitutional infirmity, this Court therefore lacks jurisdiction to reach the merits of plaintiff's claim.

II. Constitutionality Of The Gun Lake Act

While Congress may have removed this Court's jurisdiction over plaintiff's APA claim, it did not foreclose consideration of the Gun Lake Act's constitutionality. Indeed, section 2(b) only withdraws judicial review of "action[s] relating to" the Secretary's acquisition of the Bradley Tract. *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Nothing in the Act bars consideration of constitutional challenges to *Congress*'s action, and the Court declines to construe it in such a fashion.[5] Absent

5. To construct the statute otherwise would raise serious concerns about its constitutionality, and, in such a case, I heed the "cardinal principle" of statutory interpretation and choose "a construction of the statute . . . by which the (constitutional) question(s) may be avoided." *See Johnson v. Robison*, 415 U.S. 361, 367 (1974) (alternation in original) (internal quotation marks omitted); *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (finding that although a statute removed Article III jurisdiction

such an impediment, the Court may address plaintiff's constitutional challenges.

The Court's limited jurisdiction does not, however, guarantee plaintiff a victory. Quite the opposite is true. Federal statutes are presumptively constitutional, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), and litigants challenging a statute's constitutionality bear an "extremely heavy burden," *United States v. Turner*, 337 F. Supp. 1045, 1048 (D.D.C. 1972). Only "the most compelling constitutional reasons" may justify invalidating "a statutory provision that has been approved by both Houses of Congress and signed by the President." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (citation and internal quotation marks omitted). Unfortunately for plaintiff, I find that he has not surmounted this burden and, accordingly, uphold the Act.

A. Separation of Powers

Plaintiff argues that the Act raises two separation of powers concerns. Plaintiff first contends that section 2(b) infringes the role of the judiciary by requiring dismissal of this action. *See* Pl.'s Mem. at 26-32. Plaintiff next argues that by reaffirming the Secretary's May 2005 decision to take the Bradley Tract into Trust, section 2(a) unlawfully imposes Congress's "own interpretation of the IRA" on the federal courts. *See* Pl.'s Consol. Reply Defs.' & Intervenor-Def.'s Opp'n to Pl.'s Mot. Summ. J. ("Pl.'s Reply") at 31

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to review an agency action, it did "not touch [the court's] jurisdiction over [the statute's] own constitutionality").

[Dkt. #90]. For the reasons discussed below, I find both arguments unavailing.

Plaintiff's first contention presents a thorny legal issue. The Constitution prohibits the legislature from coopting the judiciary's function. The seminal case on this issue is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). There, the executor of a Confederate estate sought to recover property seized by the Union army during the Civil War. In his suit, the executor relied on a statute permitting recovery for landowners that were loyal to the Union, proof of which was satisfied by receipt of a Presidential pardon. *Id.* at 131-32. After the plaintiff recovered in the Court of Claims, Congress passed a statute directing courts to construe proof of a Presidential pardon as proof of disloyalty and, further, to dismiss, for lack of jurisdiction, any cases in which proof of a Presidential pardon was submitted. *Id.* at 133-34. Faced, on appeal, with a statute that dictated how it was to adjudicate claims of Union loyalty, the Supreme Court declared the statute unconstitutional and refused to give effect to an Act of Congress that "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *See id.* at 146.

Although *Klein* establishes limits on legislative power, it simply "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001). To preserve the balance of federal power, *Klein's* progeny have clarified that the Constitution is not offended when

Congress amends substantive federal law, even if doing so affects pending litigation. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Congress may "amend applicable law" in a way that impacts the outcome of a pending case without violating *Klein* (internal quotation marks omitted)); *see also Miller v. French*, 530 U.S. 327, 348-50 (2000) (finding no separation of powers issue where a statute "simply impose[d] the consequences of the court's application of the new legal standard"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (finding no separation of powers violation where a statute "amend[ed] [the] applicable law"). Although the line between a permissible "amendment" of the underlying law and an impermissible "rule of decision" remains unclear, federal statutes do not run afoul of *Klein* as long as they refrain from "direct[ing] any particular findings of fact or applications of law, old or new, to fact." *See Robertson*, 503 U.S. at 438.

One "sure precept" emerges from this legal thicket: "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coalition to Save Our Mall*, 269 F.3d at 1096. Yet because Congress may "impose new substantive rules on suits" that were not "resolved on the merits when Congress acted," courts faced with *Klein* challenges must tread lightly indeed. *See id.* at 1097.

Plaintiff argues that section 2(b) of the Gun Lake Act violates *Klein* because it mandates dismissal and, as a consequence, dictates a rule of decision. *See* Pl.'s Mem. at 26-32. Plaintiff is correct that dismissal has the same

practical effect as a judgment on the merits—it compels a favorable disposition for defendants. There is a difference, however, between a statute that dictates a particular decision on the merits, which *Klein* prohibits, and a statute that altogether withdraws jurisdiction to reach the merits, which *Klein* arguably does not preclude. *See Klein*, 80 U.S. at 146-47. The Gun Lake Act falls within the latter category. The Act does not mandate a particular finding of fact or application of law to fact. Instead, it withdraws this Court's jurisdiction to make any substantive findings whatsoever. Our Circuit Court considered—and rejected—a challenge to a similar statute, finding that a withdrawal of jurisdiction does not, by itself, violate *Klein*. *See Nat'l Coalition to Save our Mall*, 269 F.3d at 1097 (stating, without any detailed explanation, that the Act did not run afoul of *Klein*).

Congress's actions in this instance are more appropriately characterized as an effort to circumscribe the Court's jurisdiction. This, Congress most assuredly can do. The Constitution "gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Congress, as such, has plenary power to "define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That is precisely what happened here. Rather than dictate a particular outcome on the merits of plaintiff's case, Congress has legislatively restricted the Court's jurisdiction. I find nothing constitutionally repugnant in its exercise.

Plaintiff argues in the alternative that section 2(a) of the Act, which "reaffirm[s]" the Secretary's May 2005 decision to take the Bradley Tract into trust, violates *Klein* because it superimposes Congress's "own interpretation of the IRA without amending it."[6] *See* Pl.'s Reply at 31. Were Congress to issue such a dictate, it would surely invade the powers of the judicial branch. *See Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (opining that a statute presents constitutional problems if, rather than "*changing* the substantive law, [it] direct[s] the court how to *interpret* or apply pre-existing law"). The Court takes seriously, however, the invalidation of a Congressional action and applies the "cardinal principle" that "as between two possible interpretations of a statute by one of which it would be constitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (when faced with dueling interpretations, one of which "would raise serious constitutional problems," courts must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

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6. The Court is reluctant to opine on this particular argument, which plaintiff presented, for the first time, in his Reply brief. As this Circuit has emphasized, "[t]he premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Considering an argument advanced for the first time in a reply brief . . . entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *See McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (citations and internal quotation marks omitted).

While plaintiff has proffered one potential reading of the statute, section 2(a) can more plausibly be read in a way that does not raise constitutional concerns, *i.e.*, as an affirmance of agency rulemaking. Nowhere does the Act instruct this, or any other, Court to ratify the Secretary's action. Nor, for that matter, does it compel "any particular findings of fact or applications of law." *See Robertson*, 503 U.S. at 438. Simply put, Congress lent its imprimatur to the Secretary's decision, but stopped short of requiring the judiciary to do the same. Endorsements of this nature are hardly unprecedented and Congress has, on at least one occasion, retroactively validated agency actions taken on behalf of Native American Tribes. *See James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990) (upholding a statute that "*ratifies and confirms* [the Wampanoag Tribal Counsel's] existence as an Indian tribe" (emphasis added)); *see also Swayne & Hoyt Ltd. v. United States*, 300 U.S. 297, 301-02 (1937) (Congress may use its plenary power to "ratify [agency] acts which it might have authorized, and give the force of law to official action unauthorized when taken" (citations omitted)).

Given that the Act neither mandates a particular interpretation of the substantive law nor creates an impermissible rule of decision, I reject plaintiff's separation of powers challenge and turn to plaintiff's remaining constitutional arguments.

B. First Amendment Right to Petition

Plaintiff next argues that section 2(b) of the Gun Lake Act burdens his First Amendment Right to Petition the government. I disagree. The First Amendment protects the right of individuals "to petition the Government for a redress of grievances." U.S. Const. amend. I. The Right to Petition "is cut from the same cloth as the other guarantees of [the First] Amendment," and operates as "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Broad in scope, the right "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and guarantees, at a minimum, the right to seek redress from a federal decision-maker on the basis of a well-pleaded claim for relief, *see Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." (citation and internal quotation marks omitted)). Laws that "significant[ly] impair" this right must, like all substantial constitutional burdens, survive "exacting scrutiny." *See Elrod v. Burns*, 427 U.S. 347, 362 (1976).

Not all burdens are "significant" and although the First Amendment protects the right to speak, it does not ensure the right to speak to *all* tribunals. The distinction that emerges is narrow indeed. Congress may not foreclose a plaintiff's right to petition *all* decision-makers, but it may withdraw access to *some* decision-makers. *See Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 742

(1983) (invalidating a law that enjoined plaintiffs from filing "a meritorious suit" in state court). *But see Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 741 (D.C. Cir. 2011) (finding that a law did not violate the First Amendment because plaintiff could at least petition the agency for relief). Construing the Right to Petition more broadly would have far-reaching implications. Were it read to require access to all tribunals, the First Amendment would run headlong into another tenet of federal governance—Congress's power to "define and limit the jurisdiction of the inferior courts of the United States." *See Lauf*, 303 U.S. at 330. This, it does not do.

Plaintiff argues that the Gun Lake Act abridges his Right to Petition because it "prohibits the filing of any other lawsuit that challenges the federal Defendant's actions taking the Bradley Property into trust." *See* Pl.'s Mem. at 32. Defendants counter that although the Act enjoins filings in federal court, it does not bar plaintiff from pursuing other avenues of redress. *See* Mem. P. & A. Supp. United States' Opp'n Pl.'s Mot. Summ. J. at 22 [Dkt. #85]; Def.-Intervenor's Opp'n Pl.'s Mot. Summ. J. at 11-12 [Dkt. #86], I agree. Plaintiff may not be able to bring his claim before this Court, but he remains free to petition federal agencies, including the Department of the Interior, for relief. Nothing in the Act can be read to restrict such advocacy and this Court sees no reason to hold otherwise.

Plaintiff argues that this alternative is insufficient because any future complaints filed with the agency, whose decision Congress has ratified, "will fall upon completely

deaf ears." Pl.'s Reply at 32. The Department of the Interior may, indeed, be reticent to reverse its position. But nothing in the First Amendment entitles plaintiff to a favorable disposition of his claim. *See Am. Bus Ass'n*, 649 F.3d at 741 (refusing to find that Congressional interference with a plaintiff's potential remedies abridges the Right to Petition). The First Amendment safeguards only a citizen's right to *express* his grievance to a tribunal of competent jurisdiction. Nowhere does it "guarantee a citizen's right to receive a government response to or official consideration of a petition for redress of grievances" and I decline to find such an assurance. *See We the People Found. Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007). Accordingly, because nothing in the Petition Clause bars Congress from restricting, as it has, the forum for judicial review, I find that the Gun Lake Act does not violate the First Amendment.

C. Fifth Amendment Due Process

Plaintiff next argues that section 2(b) of the Act violates his Fifth Amendment due process rights because it requires dismissal without allowing him to fully litigate his claim. Pl.'s Mem. at 34-35. Due process challenges are governed by a two-part inquiry: "whether [plaintiff] was deprived of a protected property interest and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). A cause of action is considered a "protected property interest" only if a court has rendered "a final judgment" in that action. *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 43 (D.D.C. 2004), *aff'd*, 184 Fed. App'x 9 (D.C. Cir. 2006) ("Causes of actions only become actionable property interests upon the entry of final judgment.").

Plaintiff here argues that because the Supreme Court affirmed his standing to pursue this action, he has a property right protected by the Fifth Amendment. *See* Pl.'s Mem. at 35. Plaintiff is correct that his standing can no longer be challenged. However, he presents no authority—nor am I aware of any—to support the proposition that the ability to bring a lawsuit constitutes the type of vested property right that the Fifth Amendment due process clause protects.[7] It would be bold, to say nothing of unprecedented, to redraw the lines of property in such a fashion. Thus, in the absence of a cognizable property right, plaintiff's due process claim fails.

D. Bill of Attainder

Plaintiff's final constitutional attack to the Gun Lake Act lies in a Bill of Attainder. Article I, section 9 of the Constitution states that "[n]o Bill of Attainder . . . shall be passed." U.S. Const, art. 1 § 9, cl. 3. This provision prohibits Congress from enacting "a law that

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7. Even assuming, *arguendo*, that plaintiff has a property right in this action, he has arguably received all the process he is due. Congress has plenary power to grant, abridge, or revoke Article III jurisdiction. As the Supreme Court has held in welfare cases, which involve an analogous Congressional power to confer, and revoke, a public benefit, "[t]he procedural component of the Due Process Clause does not impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *See Atkins v. Parker*, 472 U.S. 115, 129 (1985) (citation and internal quotation marks omitted). In such instances, "the legislative process provides all the *process* that is constitutionally due" before Congress enacts a provision restricting litigants' judicial remedies. *See Am. Bus Ass'n*, 649 F.3d at 743.

legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). A law is thus a prohibited Bill of Attainder if it punishes a specific person or entity. *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998). To determine whether a statute imposes a punishment, courts assess: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute . . . reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." *Foretich v. United States*, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (quoting *Selective Serv. Sys.* v. *Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984)).

Although the Gun Lake Act applies specifically to suits involving the Bradley Tract, this alone is not problematic. *See Nat'l Coalition to Save Our Mall*, 269 F.3d at 1097 (finding a "[statute's] level of specificity to be unobjectionable"). Notwithstanding its specificity, the Gun Lake Act does not qualify as a Bill of Attainder for a second reason: it is not punitive. Jurisdiction stripping is simply not "punishment" in a historical sense—it does not impose a prison sentence, a fine, or any restriction that falls within the traditional "checklist of deprivations and disabilities" proscribed by the Constitution. *See Foretich*, 351 F.3d at 1218 ("This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions."). Nor was Congress's goal to disadvantage Mr. David Patchak. The Act's express purpose was to "provide

certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 113-194 at 2 (2014). The Act may have incidentally affected plaintiff's use and enjoyment of his property. But incidental burdens do not a punishment make. As such, plaintiff's final constitutional challenge is no more meritorious than his prior attacks.

Having rejected each of plaintiff's challenges, I find no constitutional obstacle to the enforcement of the Gun Lake Act and must decline, for want of jurisdiction, to reach the merits of plaintiff's APA challenge.

CONCLUSION

Accordingly, for all of the foregoing reasons, Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule is GRANTED, Intervenor-Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED. Finally, Plaintiff's Motion to Strike the Administrative Record Supplement is DENIED. This action is therefore DISMISSED. An Order consistent with this decision accompanies this Memorandum Opinion.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX F

CONSTITUTIONAL & STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

UNITED STATES CONSTITUTION, Article I, Section 1.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

UNITED STATES CONSTITUTION, Article III, Section 1.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

UNITED STATES CONSTITUTION, Article III, Section 2.

STATUTORY PROVISIONS

An Act

To reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-

She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Public Law 113–179, 128 STAT. 1913.

APPENDIX G

AMENDED NOTICE OF DECISION BY THE BUREAU OF INDIAN AFFAIRS, DATED SEPTEMBER 3, 2014

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437

September 3, 2014

Honorable David K. Sprague
Chairman
Match-E-Be-Nash-She-Wish Band of Pottawatomi
Indians of Michigan
P.O. Box 218/1743 142nd Avenue
Dorr, MI 49323

Re: AMENDED Notice of Decision (NOD) for the Fee to Trust Application for the Jijak Camp and Walker-Larkin (Settlement) parcels

Dear Chairman Sprague:

The Notice of Decision issued August 7, 2014 in this matter is hereby amended, as stated herein, to include more detail of the comprehensive analysis in response to 25 CFR § 151.10(a) - Statutory Authority for proposed acquisition. The remainder of the NOD subject to this amendment remains the same.

Appendix G

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) submitted application to have real property transferred into trust status pursuant to 25 United States Code (USC) § 465. The properties subject to this determination are known as Jijak Camp and Walker-Larkin (Settlement) with a total of approximately 210.07 acres. Neither property is contiguous to the Band's reservation; therefore the request for trust status is being processed with off-reservation status. The legal descriptions for these properties are illustrated below:

"Jijak Camp" Legal Description (176.47 acres)

Parcel 1:

That part of the Northeast 1/4, Section 32, Town 3 North, Range 12 West, Township of Hopkins, Allegan County, Michigan, described as: Beginning at the Northeast corner of Section 32; thence South 00°48'10" East 672.87 feet along the East line of said Northeast 1/4; thence South 89°32'27" West 1298.24 feet; thence North 00°12'52" West 672.86 feet along the West line of the Northeast 1/4 of the Northeast 1/4, Section 32; thence North 89°32'27" East 1291.33 feet along the North line of said Northeast 1/4 to the place of beginning.

Parcel 2:

That part of the Northeast 1/4 and Southeast 1/4, Section 32, Town 3 North, Range 12 West, Township of Hopkins, Allegan County, Michigan, described as: Commencing at the Northeast corner of Section 32; thence South 00°48'10"

East 672.87 feet along the East line of said Northeast 1/4 to the place of beginning of this description; thence South 00°43'10" East 813.41 feet along said East line; thence South 89°11'50" West 70.00 feet; thence South 00°48'10" East 500.00 feet along the Westerly line of 20th Street; thence South 89°11'50" West 40.00 feet along said Westerly line; thence South 00°48'10" East 493.58 feet along said Westerly line; thence North 89°32'29" West 393.51 feet; thence South 00°00'00" East 899.00 feet; thence South 40°18'35" West 788.91 feet; thence South 89°17'49" West 1630.10 feet along the South line of the Northeast 1/4 and Northwest 1/4 of the Southeast 1/4 of Section 32; thence North 00°24'09" East 1315.58 feet along the West line of the Southeast 1/4 to the center of Section 32; thence North 00°22'18" East 1331.21 feet along the West line of the Northeast 1/4; thence North 89°25'17" East 1304.95 feet along the North line of the Southwest 1/4 of the Northeast 1/4; thence North 00°12'52" West 655.50 feet along the West line of the Northeast 1/4 of the Northeast 1/4; thence North 89°32'27" East 1298.24 feet to the place of beginning.

"Settlement" (Walker-Larkin parcel)
Legal Description (33.60 acres)

(Walker)
That part of the NW ¼ of Section 28, T3N, R11W, Wayland Township, Allegan County, Michigan described as: Commencing at the North ¼ corner of said Section; then South 89°33'03" West 1000.0 feet along the North line of said NW ¼, to the place of beginning, thence South 00°55'26" East 1978.07 feet parallel with the East line

of said NW ¼, thence South 89°50'59" West 156.69 feet along the South line of the NW ¼, SE ¼. NW ¼ of said Section, thence North 00°38'39" West 659.06 feet along the East line of the West 170 feet of said NW ¼, SE ¼, NW ¼, thence North 31°36'34" West 847.21 feet, thence North 54°05'03" East 173.76 feet along the East line of 128th Avenue as recorded in Liber 527 on page 240; thence North 28°10'02" East 364.10 feet along said East line; then 01°13'02" East 172.77 feet along the East line; then North 89°33'03" East 259.99 feet along the North line of said Section to the place of beginning.

(Larkin)
That part of the Northwest ¼ of Section 28, Town 3 North, Range 11 West, Wayland Township, Allegan County, Michigan, described as: Commencing at the North ¼ corner of said section; thence South 89 degrees 33 minutes 03 seconds West 500.0 feet along the North line of said Northwest ¼ to the place of beginning; thence South 00 degrees 55 minutes 26 seconds East 1320.45 feet parallel with the East line of said Northwest ¼; thence South 89 degrees 45 minutes 02 seconds West 161.73 feet along the South line of the North ¼ of said Northwest ¼; thence South 00 degrees 47 minutes 03 seconds East 659.93 feet along the East line of the Northwest ¼, Southeast ¼ of said Northwest ¼; then South 89 degrees 50 minutes 59 seconds West 336.68 feet along the South line of said Northwest ¼, Southeast ¼, Northwest ¼; thence North 00 degrees 55 minutes 26 seconds West 1978.07 feet; thence North 89 degrees 33 minutes 03 seconds East 500.0 feet along the North line of said section to the place of beginning.

Appendix G

Regulatory Authority

The approval to acquire land in trust status for an Indian tribe is committed to the discretion of the Bureau of Indian Affairs (BIA) on behalf of the Secretary of the Interior. The BIA must review all acquisition proposals prior to making a decision as to whether the lands can be placed into trust status for a tribe. The regulatory authority governing the Secretary's acquisition of land in trust for an Indian tribe is set forth in Title 25 of the Code of Federal Regulations (CFR) §151.

The regulations specify that it is the Secretary's policy to accept lands "in trust" for the benefit of tribes when such acquisition is authorized by an Act of Congress, and (1) when such lands are within the exterior boundaries of the tribe's reservation, or adjacent thereto, or within a tribal consolidation area, or (2) when the tribe already owns an interest in the land, or (3) when the Secretary determines that the land is necessary to facilitate tribal self-determination, economic development, or tribal housing.

Pursuant to 25 CFR § 151.11, the Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h)

§ 151.10 (a) the existence of statutory authority; (b) need of the tribe for additional land; (c) the purpose for which the land will be used; (c) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (f) jurisdictional problems and potential conflict of land use which may arise; (g) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status, and (h) compliance with 516 DM 6 appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions.

(b) The location of the land relative to state boundaries and distance from the boundaries of the tribe's reservation;

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits;

(d) Contact with state and local governments pursuant to part 151.10 (e) and (f)

Accordingly, in response to the foregoing, the following analysis of the application is provided:

Appendix G

25 CFR § 151.10(a) - Statutory authority for proposed acquisition:

Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations on such authority.

Section 5 of the Indian Reorganization Act ("IRA") is the primary general statutory authority for the Secretary of the Interior ("Secretary") to acquire lands in trust for Indian tribes and individual Indians. It provides in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians ....
>
> Title to any lands or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.[1]

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1. 25 U.S.C. § 465.

In connection with the Band's applications, the Solicitor's Office evaluated whether the Secretary can exercise her authority to take the land in trust given the Supreme Court's decision in *Carcieri v. Salazar.*[2] Pursuant to *Carcieri,* to exercise her authority to take land into trust for an Indian tribe under the first definition of "Indian" in the IRA, the Secretary must determine whether the particular Indian tribe was "under federal jurisdiction" in 1934, the year the IRA was enacted.[3]

In 1999, the Department of the Interior ("Department") formally recognized the Band after review by the BIA Office of Federal Acknowledgment ("OFA") in accordance with 25 C.F.R. Part 83 (1998). The Department had earlier issued its Proposed Finding regarding the Band, accompanied by among other things a Historical Technical Report ("Technical Report),[4] on June 23, 1997.[5] The

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2. 555 U.S. 379 (2009)

3. The *Carcieri* decision addresses the Secretary's authority to acquire land in trust under the first definition of "Indian" in the IRA--"members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the Secretary's authority to acquire land in trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

4. *See* United States Department of the Interior, Office of Federal Acknowledgement, Historical Technical Report on the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (June 23, 1997) ("Technical Report"').

5. *See* United States Department of the Interior, Office of Federal Acknowledgement. Summary under the Criteria and Evidence for Proposed Finding Match-e-be-nash-she-wish Band of

Department affirmed the Proposed Finding and issued its Final Determination on October 14, 1998.[6] Relevant parts of the extensive factual and historical record developed by the Department as part of the Federal Acknowledgement Process ("FAP") and the FAP Record of Decision ("FAP ROD"), including the Technical Report, are incorporated by reference herein, as they directly bear on and establish that the Band was under federal jurisdiction at least by the time it negotiated its first treaty with the United States in 1795, and certainly by 1870.[7]

Pottawatomi Indians of Michigan, at 3 (June 23, 1997) ("Proposed Finding"). *See also* Notice of Proposed Finding for Federal Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 62 Fed. Reg. 38,113 (July 16, 1991).

6. *See* U.S. Department of the Interior, Office of Federal Acknowledgement, Summary Under the Criteria and Evidence for the Final Determination for Federal Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, at 21 (Oct. 14, 1998) ("Final Determination"). *See also* Notice of Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 63 Fed. Reg. 56,936 (Oct. 23, 1998). The Final Determination "was made following a review of the third party comments on the proposed finding to acknowledge the MBPI, of the MBPI's response to the third party comments, and of the 1998 membership MBPI list." *Id.* Among the comments was a report submitted on behalf of the City of Detroit by Dr. James M. McClurken entitled "Preliminary Comments Regarding the Branch of Acknowledgment and Research Proposed Finding for Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan," and dated January 12, 1998.

7. The Band received its final annuity payment from the Federal Government in 1870. In determining that 1870 was the "latest date of unambiguous Federal acknowledgment" the

Appendix G

In 2011, the Band submitted to the Department two reports entitled "A Summary of Federal Interaction, Prepared for Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians" by Kevin R. Finney and "The Match-e-be-nash-she-wish Band of Potawatomi Indians and the United States in the 1930s" by James M. McClurken. The Office of the Solicitor reviewed the Band's reports and other

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Department noted that "[t]he use of the obvious date of 1870 for this finding is not to be taken as a definitive determination by the Department that prior acknowledgement of the group ended in 1870." *See, e.g.*, Final; Determination, at 3, 4, 7, 11; Introduction to Proposed Finding, at 2; Proposed Finding, at 2, 5, 11, 17; Technical Report, at 1, 81. We have stated that "if a tribe is federally recognized, by definition it satisfied the IRA's term 'recognized Indian tribe' in both the cognitive and legal senses of term." *See* Memorandum from Solicitor to the Secretary of the Interior, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act*, M-37029 ("M-Opinion"), *infra*, at 23-26. "[T]he fact that the tribe is federally recognized at the time of the [trust] acquisition satisfies the 'recognized' requirement of Section 19 of the IRA, and should end the inquiry." *Id.* at 26. The IRA does not require that a tribe be "recognized" in 1934, but even assuming *arguendo* that it did, the M-Opinion explained that a tribe be "recognized" in 1934 under the IRA, the M-Opinion noted that the term "recognized" has been used historically in at least two distinct sense: a "cognitive" of quasi-anthropological sense; and a more formal legal sense to "connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States." *Id.* at 24. Given the Band's treaties with the United State and its other interactions with the Federal Government summarized in this opinion, as well as the findings in the federal acknowledgment process. There can be no question that the Band was "recognized" in 1934 under either sense of the term.

materials, including materials related to the Band's federal acknowledgement, and analyzed whether the Band was under federal jurisdiction in 1934 in an opinion dated and received July 30,2014 *(Carcieri* Opinion).

Based on the Solicitor's analysis, we conclude that the Band was under federal jurisdiction in 1934, as set forth below.

I. Application of the Two-Part Inquiry to the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

In response to the *Carcieri* decision, the Solicitor of the Department of the Interior issued an M-Opinion on March 12, 2014 titled The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, M-37029 ("M-Opinion"). The Solicitor construed the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first part examines whether there is a sufficient showing in a tribe's history, at or before 1934, that it was under federal jurisdiction.[8] The second question is to ascertain whether a tribe's jurisdictional status remained intact in 1934.[9]

As a whole, the record before the Department demonstrates that the Band satisfies the two-part inquiry. First, we conclude that the Band was under federal jurisdiction both in and before 1934. This is evident from the succession of treaties, three of which were ratified, between the Band

8. *See* M-Opinion, at 19.

9. *See id.*

and the United States that provided annuities and other benefits for the Band. A treaty between the United States and a tribe definitively establishes that the tribe was under federal jurisdiction.[10] Thus, these treaties alone require a conclusion that the Band was under federal jurisdiction prior to 1934. In addition, while not a named signatory to other treaties and agreements with Indian tribes in the area, the Federal Government guaranteed federal annuities for the Band under those treaties and agreements making it a beneficiary of the Federal Government based on its relationship with the United States as an Indian tribe. The Band received these federal annuity payments throughout the 19th Century.

In addition, although not required for our conclusion that the Band was under federal jurisdiction prior to 1934, there is ample additional evidence in the record demonstrating that the United States had engaged in a course of dealings with the Band and its members that establishes that the Band was under federal jurisdiction. Beginning in 1839, the Band resided on mission property in Allegan County, Michigan at the Griswold Indian Colony, later referred to as the Bradley Settlement, which was secured with federal funds.

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10. *Worcester v. Georgia*, 31 U.S. 515, 556, 569-60 (1832); Felix Cohen, *Handbook of Federal Indian Law* 271 (1942 ed.) (listing treaty relations as one factor relied upon by the Department in establishing tribal status); Memo. from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, (M-36759) (Nov. 16, 1967) (discussing treaty relations between the Federal Government and the Burns Paiute Tribe as evidence of tribal status even though such relations did not result in a ratified treaty). *See also* discussion below in Section II(A)(1).

The government also supported a school for the Band's children to attend, and the Band was included regularly in census documents and other federal reports. In 1890, Congress authorized the Band and other Potawatomi groups to file suit against the United States to account for unpaid treaty annuities. Not only was the Band was successful in two cases brought before the Court of Claims pursuant to this authorization, both judgments were affirmed by the U.S. Supreme Court, and the Band was included in rolls compiled by the government for the distribution of claims awards.

Second, the Band's under federal jurisdiction status remained intact in 1934, despite conflicting policies of the Department in the 1930s stemming from a lack of appropriations that limited the ability of tribal groups in Lower Michigan to organize under the IRA. In 1999, the Department formally acknowledged the Band through the FAP, and determined that it existed continuously since at least 1870. Admittedly, the Department did not at all times believe that it had legal obligations to the Band and similarly situated tribes in the Lower Peninsula. The Federal Government's jurisdiction over the Band did not cease however, despite the Department's erroneous view of its responsibilities to the Band in the 1930s, because only Congress has the authority to terminate that jurisdiction.

A. The Band Was Under Federal Jurisdiction Prior to 1934

The evidence confirming the Band's under federal jurisdiction status prior to 1934 is extensive. The Band

has been under federal jurisdiction since at least 1795, when it entered into its first treaty with the United States. Not only was the Band party to or beneficiary of several treaties with the United States, the Federal Government engaged in a wide-ranging course of dealing with the Band that included honoring the financial obligations owed to the Band stemming from treaties and the provision of services to the Band, all of which reaffirmed the government's ongoing obligation to and responsibility for the Band up to 1934.

We illustrate below the record of federal jurisdiction over the Band. First, we discuss the Band's treaties with the United States, as well as the government's failure to implement these treaties and the Band's attempts to secure additional treaty rights. Next, we describe the other evidence of the Band's jurisdictional status, notably the establishment of the Griswold Indian Colony, a mission settlement paid for with federal funds.

1. Treaties and Treaty Implementation Issues

a. Early Treaties

Over the course of its history with the Federal Government, the Band was a party to six treaties with the United States, and was the beneficiary of various rights flowing from these treaties. The history of these treaties and the Band's numerous other interactions with the Federal Government, often through the Department, are discussed below and summarized at length in the documents associated with the FAP.

Appendix G

The Band traces its origins to two Potawatomi bands: "those of Sagamah at Prairie Ronde ... and of Matchebenashshewish at Kalamazoo with some additional Potawatomi families who can be documented as having come from the Pokagon villages and from White Pigeon's village at Coldwater, Michigan, with a few Grand River Ottawa."[11] Although the Band is Potawatomi in origin, it was closely associated with neighboring Ottawa groups, and the Band's leaders even signed some treaties with the Federal Government as Chippewas or Ottawas.[12]

On August 3, 1795, the Band entered into the Treaty of Greenville with the United States, thus establishing that it was under federal jurisdiction at least as of that date.[13] In this treaty, the signatory tribes, including the Band, ceded a large portion of land following conflicts with the United States Army.[14] However, Article VII of the treaty permitted the signatory tribes to hunt on the ceded territory.[15] Article 5 clarified that the treaty tribes had a right to hunt and dwell on property relinquished by the government for the tribes in consideration for land

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11. Technical Report, at 9-10. The aboriginal territory of the Potawatomi as a whole "reached from Detroit across Southern Michigan, into northwestern Indiana, northeastern Illinois, and included the Wisconsin shore of Lake Michigan" at its greatest geographic extent. *Id.* at 11.

12. *See id.* at 9.

13. 7 Stat. 49.

14. *Id.* at 49-51. *See also* Technical Report, at 18-19, 22.

15. 7 Stat. 49, 52.

cessions, but restricted the tribes from selling these lands to any party besides the United States.[16] In consideration for the relinquished lands, Article IV of the Treaty of Greenville guaranteed the annual payment of goods to the signatory tribes and promised payments of 1,000 dollars each to the Chippewa, Ottawa, and Potawatomis.[17] The Treaty "acknowledged [the signatory tribes] to be under the protection of the said United States and no other power whatever." 7 Stat. 49, 52. Matchebenashshewish,[18] the Band's leader, signed the Greenville Treaty as a Chippewa leader and participated extensively in the proceedings.[19] He was instrumental in the proceedings, and made at least eleven speeches before, during, and after the treaty negotiations on behalf of the "'Chippewa, Ottawa, and

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16. *Id.*

17. *Id.* at 51.

18. Matchebenashshewish was also known as "Bad Bird," and in the 1795 Treaty, his name was spelled as "Mashipinashiwish." *Id.* at 54.

19. *See* Technical Report, at 18 (citing Erminie Wheeler-Voegelin and David Bond Stout, Indian Claims Commission, Anthropological Report on the Ottawa, Chippewa, and Potawatomi Indians, Vol. 25 at 19 (1974)). Although Matchebenashshewish was mentioned in the treaty proceedings as a Chippewa, he spoke on behalf of the "Chippewa, Ottawa, and Pottawatomies." *Id.* The Technical Report clarifies that "[i]t was common practice for Potawatomi villages to accept outsiders as chiefs" and, in any case, concluded that it did not "make any difference to the acknowledgability of "the Band" whether [Matchebenashshewish] was a Chippewa or Ottawa in origin." *Id.* at 18-19.

Pottawatomies."[20] At the time of the Treaty of Greenville, Matchebenashewish was associated with villages along the Kalamazoo River.[21]

Most Potawatomi bands allied with the British during the War of 1812.[22] After the war, the Band signed the Treaty of Spring Wells on September 8, 1815, in which the signatory tribes affirmed their allegiance with the United States. 7 Stat. 131. This Treaty, which was ratified by Congress on December 26, 1815, restored to the signatory tribes "all the possessions, rights, and priviledges [sic], which, they enjoyed, or were entitled to, in the year one thousand eight hundred and eleven, prior to the commencement of the late war with Great Britain; and the said tribes, upon their part, agree again to place themselves under the protection of the United States, and of no other power whatsoever."[23] The Treaty was signed by the son of Matchebenashshewish, "Paanassee, or the bird," as a

Chippewa chief.[24] Following the signing of the 1815 Treaty, "the Potawatomi of southern Michigan were in regular contact with one or another Indian agency."[25]

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20. *Id.* at 18 n.15.

21. *See id.* at 19.

22. *See id.* at 22.

23. 7 Stat. 131, 131.

24. *Id.* a 132.

25. *See* Technical Report, at 22.

Although the Band, along with other Potawatomi in southern Michigan, was technically the responsibility of the Michigan Superintendent, these Potawatomi groups also appear in records of both the Chicago agency and the Logansport, Indiana agency.[26]

The Band also participated in the Treaty of Chicago on August 19, 1821, along with other Ottawa, Chippewa, and Pottawatomi groups. 7 Stat. 218. The 1821 Treaty, which was signed by "Mat-che-pee-na-che-wish" as an Ottawa, ceded to the United States over four million acres of land, largely in what was the Michigan Territory, south of the Grand River.[27] Although the cession included most of the Band's territory along the Kalamazoo River, the Treaty of Chicago reserved two tracts of land for the Band surrounding its traditional villages: "[o]ne tract at the village of Prairie Ronde, of three miles square" and "[o]ne tract at the village of Match-e-be narh-she-wish [sic], at the head of the Kekalamazoo river."[28] Significantly, the treaty memorialized the tribes' rights to hunt on the ceded property "while it continues [sic] the property of the United States."[29] The 1821 Treaty of Chicago also

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26. *See id.* at 22-23.

27. 7 Stat. 218, 221. *See also* Technical Report at 25-28.

28. 7 Stat. 218, 219. As codified, the 1821 Treaty of Chicago clarified that "[t]he tract reserved at the village of Match-e-be-nash-she-wish, at the head of the Ke-kal-i-ma-zoo river, was by agreement to be three miles square. The extent of the reservation was accidentally omitted." *Id.* at 221. This tract was Matchebenashshewish's village in Kalamazoo County, Michigan. *See* Technical Report, at 25.

29. 7 Stat. 218, 220.

established a reserve for "the village of "Na-to-wa-se-pe, of four miles square."[30] In consideration for the land cessions, Article 4 of the Treaty promised annual payments to both the Ottawa and Potawatomi nations.[31]

Six years later, in 1827, both "Mitch-e-pe-nain-she-wish, or bad bird" and his son "Pee-nai-sheish, or little bird" signed the Treaty of St. Josephs, between the United States and the Pottawatomi bands.[32] In the 1827 Treaty, the Band ceded, "[o]ne tract at the village of Match e be nash she wish, at the head of the Kekalamazoo river, of three miles square, which tracts contain in the whole ninety nine sections and one half section of land."[33]

The stated purpose of the Treaty of St. Josephs was "to consolidate some of the dispersed bands of the Potawatamie Tribe in the Territory of Michigan."[34] It also retained the Nottawaseppi Reserve established in the 1821 Treaty of Chicago and enlarged the reservation for the signatory groups.[35] However, the 1827 Treaty did not require the Band to relocate to the Nottawaseppi Reserve or to relinquish the Band's rights to use ceded lands under the prior Treaty of Chicago of 1821.[36]

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30. *Id.* at 219.

31. *Id.* at 220.

32. 7 Stat. 305 (Sept. 19, 1827).

33. *Id.* at 306.

34. *Id.* at 305.

35. *Id.* at 306.

36. *See* Technical Report, at 29.

In the next Treaty of Chicago signed on September 26, 1833, between the United States and Chippewa, Ottawa, and Pottawatomi bands, the participating tribes ceded approximately five million acres.[37] Although neither Matchebenashshewish nor his son Penassee signed this treaty, "Sauk-e-mau" or Sagamah, the leader of the Prairie Ronde village (reserved for the Band by the 1821 Treaty), signed the supplementary articles to the 1833 Treaty.[38] The supplementary articles to the 1833 Treaty, executed on September 27, 1833 were agreed to by "the Chiefs and Head-men of the said United Nation of Indians, residing upon the reservations of land situated in the Territory of Michigan."[39] The signatories to the articles were to be considered parties to the September 26 Treaty "and entitled to participate in all the provisions therein contained."[40] The supplementary articles ceded the Nottawaseppi Reserve to the United States, and in consideration, the United States gave to the signing bands a sum of one hundred thousand dollars, including annuities to certain individuals on an attached schedule.[41]

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37. 7 Stat. 431.

38. *Id.* at 443. *See also* Technical Report, at 30-31.

39. 7 Stat. 431, 442. Both the 1833 Treaty of Chicago and its supplementary articles were ratified and confirmed by the U.S. Senate in two resolutions setting forth certain conditions and modifications. *See id.* at 447-48.

40. *Id.* at 442.

41. *Id.*

Moreover, the supplementary articles to the 1833 Treaty of Chicago required "[a]ll the Indians residing on the said reservations in Michigan shall remove therefrom within three years from this date, during which time they shall not be disturbed in their possession, nor in hunting upon the lands as heretofore."[42] Despite not signing the 1833 Treaty, Matchebenashshewish and his son Penassee received their annuity payments under that Treaty, and [t]he village of Kalamazoo (Ke kan a ma zoo village) was listed in 1833 among the Chippewa, Ottawa, and Potawatomi of Illinois and Michigan ... as having received its annuity payment."[43]

Later, in 1836, a group of Ottawa and Chippewa bands entered into the Treaty of Washington with the United States. 7 Stat. 491 (March 28, 1836). In the 1836 Treaty, the bands (1) ceded land that presently comprises the northwest one third of the State of Michigan; (2) reserved some land for their own use for a period of five years; (3) agreed to permanently resettle on land located southwest of the Missouri River; (4) reserved hunting and fishing rights on the ceded lands until the lands were needed for settlement; (5) agreed to specific sums of money to be paid immediately, and (6) were pledged an annuity of $30,000 for twenty years. The Treaty also provided that the bands would receive annual funding for specified periods of time for education, teachers, schoolhouses, books, agricultural implements, cattle, tools, salt, fish barrels, medicines, and doctors, and thereafter so long as Congress appropriated

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42. *Id.* at 442-43.

43. Technical Report, at 31.

funding.[44] Although the Band was not a party to the 1836 Treaty, a schedule referred to in Article 10 includes three classes of chiefs. Notably, "Penasee or Gun lake" is explicitly listed as one of the third class of chiefs entitled to one hundred dollars under the treaty.[45]

As a party to and beneficiary of the treaties discussed above, the Band was under federal jurisdiction since the earliest days of the Nation. These treaties provide definitive evidence that the Band was under federal jurisdiction prior to 1934, a fact that was conclusively established during the acknowledgement process. Treaty relations between the United States and Band not only reflect the recognition of the Band's status as a sovereign tribal entity capable of engaging in a government-to-government relationship with the United States but also evidence of the United States' jurisdictional relationship with the Band. Negotiating and securing a treaty with the Band derives from the inherent, authority of the Federal Government to manage Indian affairs and Congress' intention that, among other things, treaty-making with

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44. 7 Stat. 491. In *United States v. Michigan*, the court found that the United States failed to adhere to the terms of the 1836 Treaty in several ways; namely by failing to pay annuities in full, taking fishing grounds for a canal, permitting settlers to flood the area, and reducing the land available for Indian settlement. 471 F. Supp. 192, 216 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). The Band was not a party to the litigation. *See also* Technical Report, at 31-32.

45. 7 Stat. 491, 496.

tribes prevented state encroachment on the exclusively federal power to regulate affairs with Indian tribes.[46]

Treaty relations, therefore, reflect both the government-to-government relationship between the Band and the United States, as well as demonstrate the United States' acknowledged responsibility for, and obligations to, the Band.

b. The 1855 Treaty of Detroit

The Treaty of Detroit, the next treaty to which the Band was a signatory, as well as the Band's rights under that Treaty, further reinforce our conclusion that the Band was under federal jurisdiction before 1934. In June 1855, the Band's leaders Shau-bau-quong and Maw-bese were anxious about the expiration of certain terms in the 1836 Treaty and petitioned the Secretary of the Interior seeking confirmation that the Band could continue living at the colony.[47] Meanwhile, the Office of Indian Affairs[48] ("OIA") had begun preparations for a new treaty with the Ottawa and Chippewa Indians of Michigan.

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46. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.02[3], at 24.

47. *See* Technical Report, at 64-69.

48. The OIA was the predecessor entity of the BIA during the 19th Century and was an agency of the War Department. In 1849, the office was transferred to the newly created Department of the Interior.

George W. Manypenny, the Commissioner of Indian Affairs at the time, responded to the Band's petition (and another petition from Rev. Selkirk) stating that no relief could be provided to the Griswold Indian Colony, particularly given the upcoming treaty negotiations.[49]

The Band joined the group of Ottawa and Chippewa bands in participating in negotiations and entering into the Treaty of Detroit with the United States on July 31, 1855,[50] which was signed by Shau-bau-quong.[51] The Treaty, ratified on April 15, 1856, withdrew specified areas of land in Oceana and Mason Counties, Michigan, from unsold areas of public land for each signatory band and set a five-year limit during which members of each band could select allotments from the area set aside.[52] Any allotment not selected within the five-year period would remain the property of the United States.[53] The allotments were held in trust for a period of ten years.[54] The Treaty also provided for a variety of payments to the Band over a ten-year period.[55]

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49. *Id.*

50. 11 Stat. 621.

51. *See Id.* at 629. *See also* Final Determination, at 23; Technical Report, at 69-71.

52. 11 Stat. 621, 621-23.

53. *Id.* at 622-23.

54. *Id.*

55. *Id.* at 623-24.

c. The Dissolution Provision in Article 5 of the 1855 Treaty Did Not Alter the Status of the Signatory Tribes and Bands

At times, Article 5 of the 1855 Treaty has been misinterpreted as altering the status of the various signatory tribes and bands. That is inaccurate. The Article merely dissolved the federally established group of bands of the Ottawa and Chippewa Indians that had been organized for purposes of treaty negotiations. The Article provides as follows:

> The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purposes of carrying into effect the provisions of this agreement, is hereby dissolved and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.[56]

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56. *Id.* at 624.

This Article was a source of confusion for the Department, which later erroneously construed the provision erroneously as dissolving the individual Chippewa and Ottawa bands.[57] Implementation of the 1855 Treaty

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57. The government's misinterpretation of Article V of the 1855 Treaty of Detroit is perhaps best explained in *Grand Traverse Band v. Office of the United States Attorney*:

> Henry Schoolcraft, who negotiated the 1836 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty. In the years that followed, the Ottawas and Chippewas vociferously complained about being joined together as a single political unit. To address their complaints, the 1855 Treaty of Detroit contained language dissolving the artificial joinder of the two tribes. This language, however, was not intended to terminate federal recognition of either tribe, but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities. Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments "tribal relations will be terminated." Letter from Secretary of the Interior Delano to Commission of Indian Affairs at 3 (Mar. 27, 1872). Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.

369 F.3d 960, 961 n.2 (6th Cir. 2004). In that case, the Sixth Circuit found that the Grand Traverse Band of Ottawa and Chippewa

provisions were seriously delayed by the Federal Government and ultimately were never completed.[58]

However, in *United States v. Michigan*, — a case in which the Band was not a party that involved fishing rights of the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians under the Treaty of Washington,—the court concluded that this Article had no impact on the United States' government-to-government relationship with signatory bands, but was intended only to dissolve the treaty negotiation group:

> This clause was intended to accomplish two goals: to relieve the United States of the burden of convening general councils in the event local matters required attention in the future, and to satisfy the Ottawa and Chippewa's desire to be treated separately. Article 5 had no impact on the governmental structure of the bands. There was no change in the way in which the Indian agents dealt with them after the treaty, except that they were never convened again as one group.[59]

Indians was restored to federal recognition for purposes of the Indian Gaming Regulatory Act.

58. *See* Technical Report, at 71.

59. *United States v. Michigan*, 471 F. Supp. 192, 264 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

Significantly, Congress expressly repudiated the Department's treatment of similarly situated tribes who were likewise signatories to the 1855 Treaty of Detroit.[60]

d. Treaty Implementation Issues and the Loss of Trust Lands

While the treaties between the United States and the Band, as well as the establishment of the Griswold Indian Colony and provision of services to the Band, all demonstrate the Band's ongoing under-federal-jurisdiction status, additional federal actions subsequent to the Treaty of Detroit further confirm our conclusions regarding the Band. For instance, the Band's attempts to renegotiate treaties with United States further bolster our determination that the Band was under federal jurisdiction throughout the rest of the 19th Century.

As recorded in federal census rolls and pension documents, many members of the Band relocated to the reserve established for the Band in the Treaty of Detroit in Oceana County, Michigan, beginning in 1858, while some families remained in Allegan County.[61] At around that time, and consistent with the Treaty of Detroit, the Cob-moo-sa school, named after a Grand River Ottawa chief,

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60. *See* 25 U.S.C. § 1300k (finding that the United States Government had continuous dealings with the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians from 1836 to the present).

61. *See* U.S. Census Reports, Crystal Township, Michigan (1860, 1870). *See also* Technical Report, at 73-79.

was funded by the government for Indians living on the reserve in Oceana County.[62]

Throughout the 1860s, Shau-bau-quong, as well as his Ottawa and Chippewa peers, consistently petitioned the government and participated in numerous failed efforts to negotiate new treaties with federal agents, due in part because they did not believe their Treaties were being upheld.[63] For example, during the American Civil War, the United States took no additional action to implement the provisions of the Treaty of Detroit, particularly the elaborate allotment provisions in the treaty.[64] This was in part due to the OIA's failure to produce the requisite lists of Indians under the treaty for the purpose of making allotments.[65] In addition, the government failed to enforce a preemption clause in the Treaty of Detroit, which exempted lands occupied by settlers or by "persons entitled to pre-emption," providing that all "such pre-emption claims shall be proved, as prescribed by law."[66]

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62. *See* Technical Report, at 74.

63. *See, e.g.*, Letter from Indian Agent Leach to Commissioner of Indian Affairs (Oct. 4, 1864); Letter from Indian Agent Leach to Commissioner of Indian Affairs (June 14, 1864). *See also* James McClurken, Our People, Our Journey: The Little River Band of Ottawa Indians, at 76-77 (2009) ("McClurken"); Technical Report, at 74-81, 86.

64. *See* Technical Report, at 74-76, 81-82.

65. *See id.* at 83-86.

66. 11 Stat. 621, 626-67.

As a result, many of the lands withdrawn by the treaty were occupied by settlers and even the State of Michigan.[67]

Frustrated by the failure of the allotment process, in 1863, Shau-bau-quong and other tribal leaders requested to send a delegation to Washington, D.C., through the local Indian Agent.[68] In 1865, Shau-bau-quong was elected by Indians living in the Oceana County (and also Mason County) settlements as "Chief Speaker" for negotiations of a new treaty between the Ottawa and Chippewa bands.[69] Although the government expressed some interest and made preliminary steps to enter into a new treaty with the Ottawa and Chippewa bands, these plans failed to materialize.[70]

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67. *See* Technical Report, at 82-83.

68. *See, e.g.,* Letter from Louis Genereau, Interpreter to Indian Agent Leach (Nov. 7, 1863).

69. *See* Technical report, at 79-80.

70. *See id.* In fact, in 1868, "Moses Shawbequoung, who often spoke for the Indian Town community, prepared to send delegates to Washington, complaining that 'We have laid this matter before our Agent year after year, but no answer yet; while other tribe [sic] of Indians are making treaties with the Government every year." McClurken, at 76-77. Although officials denied this request, the Grand River bands sent a delegation anyway. Although they failed in their efforts to negotiate a new treaty, the delegation anyway. Although they failed in their efforts to negotiate a new treaty, the delegation "returned to Michigan believing that the commissioner of Indian Affairs had promised that federal negotiators would soon visit Michigan." *Id.*

The Band, including Shau-bau-quong, then left Oceana County and returned to Allegan County between 1869 and 1877.[71] This was a consequence of several factors, including: the government's failed allotment policies under the Treaty of Detroit; the final distribution of residual annuities paid to the Band in 1870;[72] and the Federal Government's closure of its schools in Oceana County.[73]

Meanwhile, a significant portion of the Band's reserve lands continued to be claimed by non-Indian settlers, especially in the aftermath of certain Congressional enactments in the 1870s.[74] Shau-bau-quong regularly made official petitions to the President, the Secretary of the Interior, legislators, Indian agents, and the OIA on behalf of the Band, and at one point requested the closure of the OIA "so that the Indians could bargain directly with the Department of the Interior."[75] Nevertheless, "[d]uring the decade 1870-1880, the Indian agent in Michigan was aware of the [Band] and its location near Bradley."[76]

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71. *See* Technical Report, at 81.

72. *See id.*

73. *See id.* at 74, 87.

74. *See* McClurken, at 80-82, 88-90, 103-05 (citing the Michigan Indian Homestead Act of 1872 and amending legislation in 1875 and 1876).

75. *See* Technical Report at 86, 89, 89 n.91.

76. *Id.* at 87.

The trust property at Bradley, too, was divided and sold when the State of Michigan began to tax the former mission site in 1874,[77] and when the trust property was allotted pursuant to a Trust Statement previously executed by Bishop McCoskry, who at that point bad left Michigan.[78] The process of the trust dissolution continued in the courts well into the next decade.[79] During that period, D.K. Foster, the brother of Moses Foster or Shau-bau-quong was employed by the Federal Government as a teacher and interpreter for the Band.[80] He corresponded regularly with the Michigan Indian Agent, who also expressed concerns and requested federal assistance regarding the division and loss of trust land to settlers.[81]

That the Band continued to engage in additional treaty relations with the United States after 1855, as well as its numerous interactions with government agents and officials, all demonstrate that the Federal Government clearly regarded the Band as a sovereign entity capable of engaging in a formal treaty relationship with the United States and as such, necessarily requires the conclusion that the band was also under the jurisdiction of the Federal Government.[82]

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77. *See id.* at 89.

78. *See id.* at 67-68, 92-94.

79. *See id.* at 94-95.

80. *See id.* at 89-95.

81. *Id.*

82. *See* Record of Decision: Trust Acquisition of, and Reservation Proclamation for the 151.87 acre Cowlitz Parcel in

2. Other Indicia of Federal Jurisdiction

a. The Griswold Indian Colony, Annuity Payments, and Federal Census Reports

While the treaty making evidence definitively establishes that the Band was under federal jurisdiction prior to 1934, other evidence also supports this determination. For example, in the late 1830s, federal efforts were underway to remove the Potawatomi living in Michigan.[83] As discussed in more detail below, the Band avoided being removed to reservations further West by taking asylum with a church mission in central Michigan, near the town of Bradley, initially referred to as the Griswold Indian Colony. By 1838, the Band moved from the Kalamazoo Village site to the Griswold Indian Colony in what is now Allegan County. Michigan.[84] As summarized below, the relocation to the Griswold Indian Colony, coupled with additional federal payments and provisions to aid the Band during this period, further support our finding of federal jurisdiction over the Band.

Clark County, Washington, for the Cowlitz Indian Tribe, at 79 (April 22, 2013), *available at* http://cowlitzeis.com/documents/record_of_decision_2013.pdf ("Cowlitz ROD").

83. *See* Technical Report, at 32-33.

84. *See id.* at 34-35, 46. Historical materials locate the Band near Martin, Michigan, in 1836, and then later at Hastings Point at Gun Lake by the winter of 1839-1840. *See id.*

Appendix G

Following an incident involving the murder of a family of white settlers in the Grand River Valley in early 1838,[85] the OIA responded to local concerns that the Grand River Ottawa or other Indians nearby were involved by entering into a compact with the Band and other Indians.[86] Although it was later determined that the crime was committed by another settler. Michigan Superintendent. Henry Rowe Schoolcraft, initiated the Compact of June 5, 1838, with the Grand River bands.[87]

While the Band did not sign the 1838 Compact,[88] between 1838 and 1839, it nonetheless is significant that Superintendent Schoolcraft extended benefits to the Band along with the Grand River Ottawa, and the Band began to receive annuities from the government under

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85. *See* Technical Report, at 46. *See also* Letter from Henry Schoolcraft to COIA Harris (April 6, 1838); Letter from Lyons to Henry Schoolcraft (March 30, 1838); Letter from Henry Schoolcraft to Lyons (April 6, 1133); Letter from Henry Schoolcraft to COIA Harris (May 1, 1838).

86. *See* Technical Report, at 46- 47.

87. See *id. See also* Letter from Henry Schoolcraft to COIA Harris (June 18, 1838). The 1838 Compact set forth a general assurance of mutual friendship and modified the Treaty of Washington with the Ottawa and Chippewa to provide for provisions of tobacco and salt, as well as a more convenient location for making annuity payments, to the Grand River bands. *See* Technical Report, at 47; Compact Between Henry Schoolcraft and Grand River Ottawa. (June 5, 1838).

88. *See* Technical Report, at 48.

the Compact.[89] Thus, the Band is included as the "Gun Lake Village" in a list of Grand River Bands, specifically in a document setting forth "Payment to the Ottawa and Chippewa Indians, 1839."[90]

The Griswold Indian Colony (also known as the Selkirk Mission), where the Band ultimately settled, was established in 1839.[91] President Martin Van Buren had developed a means to "educate and civilize" tribes in Michigan by funding five Christian denominations.[92] Superintendent Schoolcraft had earlier identified Samuel Allen McCoskry, an Episcopal Bishop, as eligible to receive funds for "Indian Missions and Schools, within the State of Michigan."[93] During the summer of 1839, Rev. James Selkirk, who had been designated by Bishop McCoskry as a missionary, selected land for the Griswold Indian Colony about four miles west of Gun Lake (and several miles northeast of Bradley) with the assistance of Sagamah, the leader of the Band at the Prairie Ronde Village, and his associates.[94] In June 1839, Selkirk acquired property for the mission under Bishop McCoskry's name using federal

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89. *See id.*

90. *Id.*

91. *See id.* at 38-39.

92. *See id.*

93. *See id. See also* Letter from Henry Schoolcraft to COIA Harris (April 27, 1837); Letter from Henry Schoolcraft to COIA Harris (May 27, 1837).

94. Autobiography of Rev. James Selkirk, at 34.

funds.[95] By November 1839, the Band had relocated to the Griswold Indian Colony near Gun Lake with other Potawatomis and Ottawas.[96]

In 1840, Superintendent Schoolcraft conducted a survey under the jurisdiction of the Michilimackinac Agency for the Commissioner of Indian Affairs. In that survey, the Band, under the name "Gun Lake or Griswold" with the notation "Compact June 5, 1838" is listed as one of the bands "entitled to receive annuities under the Treaty of 28th March 1836."[97] Subsequent to Schoolcraft's actions, the Band was closely associated with the Ottawa and Chippewa Bands by the Federal Government, particularly for purposes of treaty negotiation and certain payments.

Also beginning in 1840, Selkirk and Bishop McCoskry reported regularly on the progress of the Griswold Indian Colony to the Office of Indian Affairs over the course of the next fifteen years.[98] The Band was likewise included in federal Indian censuses (as Ottawas) and other annual

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95. Technical Report, at 42-43. *See also* Letter from Henry Schoolcraft to COIA Harris (Sept. 30, I 839) (stating that Bishop McCroskey reported in July 1939 that "the fund committed to him has been and is in the process of being applied to the object with good prospect of success.").

96. *See* Technical Report, at 43; Final Determination at 9, 11.

97. *See* Technical Report, at 48. *See also* "Indian Population Within the Agency of Michilimackinac" (Sept. 30, 1840).

98. *See* Technical Report, at 49-61.

reports.[99] In addition, as discussed above, the Band received annuity payments along with the Grand River Ottawa bands during this time.[100]

By 1845, both Matchebenashewish and Sagamah had died, and were succeeded by Penassee.[101] Penassee remained the exclusive leader of the Band until his death in 1854, when the Band elected as chief Penassee's oldest son, Shaw-bau-quong, also known as Moses Foster.[102] Although federal funding for the benefit of the Band and other Indians was set to expire in 1855 pursuant to the terms of the 1836 Treaty of Washington, the Federal Government continued providing funding for another three years.[103] In sum, the establishment of the Griswold Indian Colony with federal funds, the payment of annuities, and the Band's inclusions on federal Indian censuses and other annual reports support our finding of federal jurisdiction over the Band during the 1830s and 1840s, as well.

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99. *See e.g., id.* at 61-69. The Technical Report clarifies that the population at the Griswold Indian Colony included a Potawatomi base "with a few Grand River Ottawa and even an occasional Chippewa" *Id.* at 40.

100. *See id.* at 48.

101. *See* Technical Report, at 5. *See also* Autobiography of Rev. James Selkirk, at 40-43.

102. *See id.*

103. *See* Technical Report, at 68.

b. Claims Activities and Educational Services

In addition, in the late 19th Century, the Band asserted successful claims against the United States in several federal court cases, by participating in the legal efforts led by the other Potawatomi bands in Michigan that sought unpaid tribal annuities from the United States.[104] Significantly, an 1890 Act of Congress granted jurisdiction to the United States Court of Claims to "try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon."[105] This legislation, along with the federal courts' decisions in favor of the Band for financial compensation show both that the Band was under federal jurisdiction, and that the United States bad established money-mandating duties to the Band, even though the government did not acknowledge these obligations at the time.[106] As the Office of Federal Acknowledgment recognized in its Proposed Finding, which was affirmed in the Band's final acknowledgement determination:

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104. *See id.* at 101-02.

105. 26 Stat. 24 (1890).

106. *Cf. Carcieri*, 555 U.S. at 398-99 (Breyer, J., concurring) ("And the Department has sometimes considered that circumstances circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934 – even though the Department did not know it at the time.").

Appendix G

> In 1882, in cooperation with Chief Phineas Pamptopee of the [Huron Potawatomi], [Band] leaders Chief Shau-be-quo-ung (a.k.a. Moses Foster) and his brother David K. Foster began to press the issue of Potawatomi claims interests. An Act of Congress (March 19, 1890, 26 Stat. 24), granted jurisdiction to the U.S. Court of Claims, after which both (bands] and the Pokagon Potawatomi filed suits on behalf of "all the Potawatomi Indians in the States of Michigan and Indiana" in *Potawatomi Indians v. The United States and Phineas Pam-To-Pee* and *1371 Other Potawatomi Indians v. The United States.* The court records generated by this suit in the period 1882-1904 included numerous depositions identifying and describing the Allegan County Indian community, specifying its ties to Match-e-be-nash-she-wish's Band from the former Kalamazoo Reserve.[107]

Several members of the Band, including those who no longer lived in Allegan County, provided depositions regarding the history and composition of the Band.[108] The Potawatomi bands successfully litigated their case, and on March 28, 1892, the U.S. Court of Claims awarded funds to certain individuals listed on specific annuity rolls and their descendants.[109] The Court of Claims' award to the

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107. *See* Proposed Finding, at 3.

108. *See* Technical Report, at 107-09.

109. 27 Ct. Cl. 403 (1892).

Potawatomi was upheld by the U.S. Supreme Court on April 17, 1893.[110]

In its decision, the Court of Claims did not determine the names of the individual Potawatomi Indians who were eligible for compensation as a result of its judgment.[111] Accordingly, the Secretary of the Interior and the Commissioner of Indian Affairs prepared a roll (the "Cadman Roll") in 1895 identifying the individual Potawatomi Indians entitled to receive payments.[112] The Cadman Roll, for the most part, included only the descendants of those on a prior payment roll for Pottawatomi Indians but excluded the Band.[113] In a letter dated April 2, 1896, the Commissioner of Indian Affairs explained the rationale for the exclusion.[114] He stated that "they allied themselves with the Ottawa and Chippewa Indians in 1855 at a Treaty made with such Indians at Detroit, Michigan and shared in the annuities and distribution of lands made to said Indians in 1855 to 1871, and were never enrolled with any Pottawatomi Indians."[115] The Band's residence at the Bradley settlement confirmed the Commissioner's view that the Band allied

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110. *Pam-To-Pee v. United States*, 148 U.S. 691 (1893).

111. *See* Technical Report, at 109.

112. *See id.*

113. *See id.*

114. *See id.* at 109-110 (citing Letter from the Commissioner of Indian Affairs to Hon. H.F. Thomas (April 2, 1896).

115. *Id.*

with the Ottawas and Chippewas who resided thereby, and consistent with the view, omitted the Band from the Cadman Roll.[116]

Nevertheless, leaders of the Band, along with the Huron and other Michigan Potawatomi, continued to pursue claims against the government through the court system[117] and in 1902, the United States Supreme Court concluded that certain Michigan Potawatomi Indians, in addition to those individuals on the Cadman Roll were entitled to payment, including those living on the settlements in Allegan County.[118] Congress, in turn, appropriated money to pay the claimants listed in the lawsuit.[119] This Supreme Court decision was the basis for the preparation by the government of the 1904 Taggart Roll to determine the Potawatomi individuals eligible for payment.[120] The Taggart Roll included the majority of the Band's members

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116. *See id.* at 109.

117. *See* 36 Ct. Cl. 427 (1901).

118. *Pam-To-Pee v. United States*, 187 U.S. 371 (1902). The Supreme Court explained that on August 23, 1894, Congress passed legislation, 28 Stat. 424, 450, appropriating money for the payment of Court of Claims' earlier judgment in favor of the Potawatomi claimants. On March 2, 1895, it passed another act, 28 Stat. 876, 894, directing the Secretary of the Interior to assign an inspector to take a census and prepare a roll of the individual Indians who were entitled to share in the judgment. 187 U.S. at 374. *See also* Technical Report, at 111 (stating that the Supreme Court's decision occurred in 1899).

119. *See* Pub L. No. 58-125 (1904).

120. *See* Technical Report, at 116-17.

living in Allegan County, among other Potawatomi groups.[121]

Similarly, because of the Band's close association with the Grand River Ottawa, it was also included in the 1908 Durant Roll, which was compiled by the OIA for the distribution of another claims award to the Ottawa and Chippewa tribes of Michigan.[122]

As early as 1896, D.K. Foster had simultaneously been submitting claims on behalf of the Band under the Ottawa treaties with the United States.[123] In order to compile the Durant Roll, OIA "special agent Durant tracked each individual who had been listed in Shop-quo-ung's band on the 1870 Ottawa final annuity payment roll and what had become of them and their families in the interval."[124]

Apart from monetary compensation, the Federal Government also exercised its jurisdiction over the Band through the operation of education programs from the 1890s to the 1930s. In 1893, the Mount Pleasant Indian Industrial School was established on an Indian reservation in Isabella County, Michigan, in accordance with Article 2 of the 1855 Treaty of Detroit.[125] The Band's children from

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121. *See id. See also* Final Determination, at 11, 28-29.

122. *See* Technical Report, at 117.

123. *See id.* at 118.

124. *Id.*

125. *See id.* at 113.

Bradley Settlement regularly attended the school, from its establishment until its closing in 1934, pursuant to an Act of Congress transferring the school to the State of Michigan and requiring that Indian children be accepted in the state public schools without discrimination.[126] The United States oversaw operations at the school throughout this time and maintained records of the Band's children attending Mount Pleasant.[127] In addition, in 1900 and 1910, the federal census enumerated the Band members in Allegan County on its special Indian Population schedules.[128]

In sum, the first prong of the test is readily satisfied: before 1934, the United States, *inter alia*, entered into multiple treaties with the Band, provided annuity payments to the Band under the treaties until 1870, listed Band members on various federal census rolls, and provided federal funding for both the establishment of the Griswold Indian Colony and educational services to the Band. This entire history reflects wide-ranging federal course of dealing that demonstrates that the Band was under federal jurisdiction prior to 1934.

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126. *See id.* at 113, 130. *See also* Pub. L. No. 73-95 (1934).

127. *See* Records of the Bureau of Indian Affairs in NARA's Great Lakes Region, Mt. Pleasant Indian School and Agency Student Case files, 1893-1946 (RG 75) (1920-1925).

128. *See* OFA Proposed Finding, at 3-4. Earlier, "[t]he group's settlement in Wayland Township, near Bradley and on the lands of the former Griswold Mission, was enumerated on the 1880 Federal census of Allegan County, Michigan, as an 'Indian Colony.'" *Id* at 3.

B. The Tribe's Under Federal Jurisdiction Status Remained Intact in 1934

The next step of the inquiry focuses on whether the Band's jurisdictional relationship with the United States remained intact in 1934. In concluding that it did, we first describe the Department's fiscal concerns in the 1930s and their negative implications for the ability of tribes in Lower Michigan to organize under the IRA during that time. Next, summarize the Band's collaborations with other groups to pursue organization, as well as the Federal Government's investigations into and reports on the status of the Michigan Indians.

Lastly, as the Department highlighted in its Proposed Finding and Technical Report, we explain that the government commissioned a study of the condition of these tribes in 1939 in response to multiple requests for IRA organization from Indian groups throughout Michigan.[129] The 1939 survey by Holst, discussed below, reflected the Department's view at the time that it lacked the funds to implement the IRA in Michigan further, and that the State had assumed responsibility over the tribes there. In response to recommendations from agency officials, the Commissioner of Indian Affairs in 1940 "issued a policy limiting further extension of Federal services to Indians in Lower Michigan" including the Band.[130]

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129. *See* Proposed Finding, at 4; Technical Report, at 2, 131-32.

130. Technical Report, at 133. *See also* Proposed Finding, at 4; Technical Report, at 2, 130, 132-33.

Despite the Department's inactivity with respect to the Band during the 1930s, we conclude that its jurisdictional status remained intact.[131] The Department's numerous statements dismissing its obligations to the Band and other Michigan tribes did not, and could not terminate the relationship between the Band and the United States.[132] Once a tribe is clearly under federal jurisdiction, as was the case with the Band through a series of treaties dating back to 1795, only Congress has the authority to terminate the Band's under federal jurisdiction status.[133] Moreover, it would have been unnecessary for the Department to adopt a policy of withdrawing services from the southern Michigan Indian tribes like the Band unless there was a preexisting obligation to such Indian tribes. Stated another way, if the Band was not under the jurisdiction of the Federal Government in the 1930s, the Department would not have been required to shift its policy and withdraw services from it and other southern Michigan Indian tribes by 1940.

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131. *See* M-Opinion, at 20.

132. *See id.* at 20 n. 122 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1]). *See also United States v. Long*, 324 F.3d 475, 479-80 (7th Cir. 2003); *Hargo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

133. *See id.* at 20 n. 123 (citing *United States v. John*, 437 U.S. 634, 653 (1978).

Appendix G

1. The Department's Fiscal Concerns in the 1930s and Their Effects on Lower Michigan

The IRA is considered the "crowning achievement" of many years of effort to change the Federal Government's Indian policy.[134] As the Supreme Court has held, the "overriding purpose" of the IRA was to "establish a machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.[135] This "sweeping" legislation manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy characterized by the General Allotment Act, which had been designed to "put an end to tribal organization and to "dealings with Indians ... as tribes."[136] To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-governance. Apart from Section 5, Congress authorized Indian tribes

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134. *See generally* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05.

135. *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

136. *Mescalaro Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler)). *See also* The Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (1928) (detailing the deplorable status of health, *id.* at 3-4, 189-345, poverty, *id.* at 4-8, 430-60, 677-701, education, *id.* at 346-48, and loss of land, *id.* at 460-79). The IRA was not confined to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of "Indian tribe." 25 U.S.C. § 479.

to adopt their own constitutions and bylaws[137] and to incorporate.[138] It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application.[139]

The desired economic objectives of the IRA were not immediately achieved.[140] This was exacerbated by the Great Depression, and "on a practical economic level the federal government was unable to respond fully to the economic plight of Indian people."[141] Similarly, "[t]he coming of the Second World War and the end of the New Deal native policy found Indian country with most of the same problems it faced at the end of the First World War."[142]

The Department's failure to fully implement the IRA is reflected in its interactions with and policy approaches towards the Indian tribes of Lower Michigan, based on constrained and limited federal resources. It appears that in implementing the IRA, Department officials believed that in order for the landless Indian groups in southern Michigan to organize under the IRA, the government was

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137. Section 16, 25 U.S.C. § 476.

138. Section 17, 25 U.S.C. § 477.

139. Section 18, 25 U.S.C. § 478.

140. *See generally* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05.

141. *Id.*

142. *Id.*

required to purchase lands, and the evidence suggests that there was a policy determination not to expend limited funds in this area.[143]

It is important to emphasize here that Congress has explicitly found that, like the Band, other similarly situated Lower Michigan tribes were not permitted to organize under the IRA by agents of the Federal Government, not based on the merits, the tribes' history, or their need, but rather due to a lack of funding to comply with what was perceived to be necessary to implement the provisions of the Act.[144] Significantly, Congress found that in spite of the government's denial of their rights to organize under the IRA, these tribes maintained continuous dealings with the Federal Government since its early history.[145]

The legislative history of laws and proposed legislation recognizing these Michigan tribes or reaffirming the federal relationship with them likewise confirm Congress'

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143. *See, e.g.*, Letter from M.L. Burns to John Collier (April 6, 1936) (discussed *infra*). ("With the passage of the Indian Reorganization Act, a problematical issue arose in Michigan among the Indians as to what benefits were in store for them under the new legislation. They did not seem to realize that the Act was primarily drawn up to legislate for those Indians who were directly under Federal jurisdiction, living within the confines of reservations and enrolled members of tribes.").

144. *See* 25 U.S.C. § 1300j (Pokagon Band of Potawatomi Indians) and 25 U.S.C. § 1300k (Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians).

145. *See id.*

rejection of the Department's stance towards Lower Michigan tribes during the 1930s.[146]

Thus, the Department's statements, discussed below, about the lack of applicability of the IRA to the Band and other southern Michigan Indian tribes were wrong because, as later found by Congress, the IRA applied to all "Indians" as that term is defined in Section 19 of the statute, and these definitions are not limited by congressional appropriations.[147]

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146. *See, e.g.*, S. Rep. No. 103-260 (1994) ("Although many members of the [Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians] continued to live within the exterior boundaries of the reservations a number of whom lived on restricted fee and trust parcels, the federal officials ultimately withheld the assistance promised to the Bands. This failure to permit the Bands to organize pursuant to the Indian Reorganization Act was predicated on the Bureau's assumption that residence on trust lands held in common for the Bands was required for reorganization and that appropriations to purchase such lands had run out."); H.R. Rep. No. 103-620 (1994) ("The Pokagon Band was not permitted to complete the process of organizing pursuant to the IRA however, because of an administrative decision not to provide services or to extend the benefits of the Indian Reorganization Act to Indian tribal governments in Michigan's lower peninsula. In great part the administrative decision was predicated on the misguided assumption that residence on trust lands held in common for the Band was required for reorganization and the fact that appropriations to purchase such lands had run out."). *See also* Reorganization Act benefits to the [Burt Lake Band of Ottawa and Chippewa Indians] did not terminate the band's government-to-government relationship with the United States, and Congress has never taken any action to terminate Federal acknowledgment of the Burt Lake Band.").

147. 25 U.S.C. § 479.

Accordingly, erroneous statements from various executive branch officials do not overcome the conclusion that the Band was under federal jurisdiction in 1934, even if the Department "did not believe so at the time."[148]

Unfortunately, the Department's mistaken position resulted in the rendering of numerous erroneous administrative decisions and communications with respect to groups in the Lower Michigan peninsula, including the Band.[149] Nevertheless, as we elaborate in more detail below, the tribes in Lower Michigan continued to petition the government for action and for assistance, as well as to express frustration.

2. Efforts to Reorganize in the 1930s

During the 1930s, the Band collaborated with other tribal groups in pursuing organization under the IRA, despite receiving numerous, albeit confusing and inconsistent

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148. *See Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring). *See also* M-Opinion at 3, 20.

149. *See, e.g.*, Letter from William Zimmerman, Jr., Assistant Commissioner for Indian Affairs to Albert J. Engel (Dec. 29, 1938). The Department's treatment of some tribal groups in Lower Michigan was also vexed by the Department's interpretation of Section 5 of the 1855 Treaty of Detroit, an interpretation that was later invalidated by the federal courts. *See Grant Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960 (6th Cir. 2004); *United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981, *cert. denied*, 454 U.S. 1124 (1981).

responses from the Department about the status of Indians in Michigan's Lower Peninsula. The confusion appears to have arisen largely in response to fiscal concerns related to tribal services, as well as to the Department's earlier mistaken interpretation of the 1855 Treaty with the Chippewas and Ottawas.[150]

The historical record shows that members of the Band participated with both the Potawatomis and the Chippewas and Ottawas of Michigan in their attempts to organize under the IRA. For instance, two groups of Potawatomis filed petitions seeking inclusion in IRA efforts: the Nottawaseppi Band at Athens in 1934[151] and the Potawatomis of Michigan and Indiana in 1938.[152] The latter group counted as members Potawatomis living in various counties in Southern Michigan, including Allegan County.[153]

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150. *See, e.g.*, Letter from John Collier to the Hon. B.K. Wheeler (April 18, 1838) (discussed *infra*).

151. *See* Letter from Austin Mandoka *et al.* to John Collier (March 20, 1934).

152. *See* Letter from John D. Williams *et al.* to John Collier (May 2, 1932 [sic]).

153. The record suggests that a Potawatomi with family living in Allegan County contacted Commissioner of Indian Affairs John Collier in September 1934 inquiring as to the "conditions, if any, may an Indian with a small holding live in a chartered community?" *See* Letter from Francis S. Wakefield to John Collier (Sept. 7, 1934). Collier's response requested more information about the community, while also stating that the details for administering the IRA and the rules for its implementation had not yet been completed. *See* Letter from John Collier to Francis S. Wakefield (Sept. 21, 1934).

At the same time, during the 1930s, Chippewa and Ottawa bands in Michigan were commonly met with and addressed as a group by the government. By letter dated April 28, 1934, Superintendent Frank Christy advised Commissioner of Indian Affairs John Collier that he intended to meet with the Ottawas and Chippewas of the Grand Traverse District to explain to them that the applicability of the IRA to the Ottawas and Potawatomis of Michigan depended on congressional appropriations.[154] By letter dated May 4, 1934, Collier responded to Christy confirming that Christy's statement about the applicability of the bill (IRA) was correct and suggested that the Indians should contact their congressmen if they favored the bill.[155] Collier stated that this advice "also applies to the Pottawatomi Indians."[156] The next day, Christy discussed the bill at a meeting attended by over a hundred Indian individuals, largely from the Grand Traverse Band of Ottawas and Chippewas.[157] He reported that "[t]he Indians were frankly told that the question of whether the provisions of the proposed legislation would apply to them or to other Indians similarly situated would depend on the amounts of the appropriations which Congress might provide." Sampson Pigeon, a lifelong member and

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154. *See* Letter from Frank Christy, Superintendent to Commissioner of Indian Affairs (April 28, 1934).

155. *See* Letter from Commissioner John Collier to Frank Christy (April 28, 1934).

156. *Id.*

157. *See* Letter from Frank Christy to John Collier (May 9, 1934).

recognized leader of the Bradley community attended this meeting, which was held near Suttons Bay, as a speaker representing one of the districts.[158]

The Potawatomis of Michigan and Indiana also explored reorganizing under the IRA in 1934, and selected a committee of five leaders who asked the Secretary of the Interior for advice about filing the appropriate documents necessary "to share in the benefits of the IRA."[159] The committee then wrote Senator Arthur Vandenberg of Grand Rapids for assistance.[160] Senator Vandenberg forwarded the Potawatomi request for information to Commissioner Collier, who sent the committee a copy of the act and inquired as to which definition of Indian the group fell within, under Section 19 of the IRA.[161]

However, before the Potawatomis could reply, a December 17, 1934, letter from William Zimmerman, Jr., Assistant Commissioner, Indian Affairs, advised Senator Vandenberg on the status of Michigan Indians. Zimmerman stated without further elaboration that "since

158. *Id.* As discussed above, the Band was a signatory to the 1855 Treaty of Detroit and at times had therefore been associated with the Ottawa and Chippewa groups of Michigan.

159. *See* Letter from Paul Knapp *et al.* to Secretary of the Interior (Nov. 24, 1934).

160. *See* Letter from Paul Knapp *et al.* to Arthur Vandenberg (Nov. 2, 1934).

161. *See* Letter from A.H. Vandenberg to John Collier, Commissioner of Indian Affairs (Dec. 3, 1934); Letter from John Collier to Michael Williams (Dec. 4, 1934).

practically all of the Michigan Indians had lost their wardship status and are not members of a recognized tribe under federal jurisdiction," they would be required to organize as half-bloods.[162] He further stated that the OIA was making arrangements to extend the benefits of the IRA Act to several thousand qualified Indians in the northern part of Michigan.[163] Thus, it appears that Assistant Commissioner's Zimmerman's statements do not reflect any contemplation of the Band's history or relationship with the United States, a relationship that is amply demonstrated by the numerous treaties with the Band, as discussed above. The Assistant Commissioner's actions in this regard stemmed not from consideration of the details concerning the Band's jurisdictional status, but primarily from concerns that the Department did not have adequate funding to fully implement the IRA in Lower Michigan. These financial issues drove the Department's policy concerning the implementation of the IRA in Michigan; as noted above, Congress later repudiated this approach, finding that the Department's obligations to Lower Michigan Indian tribes persisted, despite the budgetary constraints the agency faced at that time.

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162. Letter from William Zimmerman, Jr., Acting Commissioner to Hon. A.H. Vandenberg (Dec. 17, 1934) (stating that the "Potawatomi Indians of Southwestern Michigan ... must have one-half degree or more of Indian blood in order to be able to participate in the benefits of the Indian Reorganization Act" and recommending that the Potawatomi group send "a list of the Potawatomies, their financial and blood status, and any other information that would help us to determine what we can legally do for them under the provisions of the Indian Reorganization Act.").

163. *See id.*

Appendix G

The Potawatomi of Michigan and Indiana committee of five leaders seeking information regarding the IRA ultimately responded to John Collier's letter inquiring as to what classification the group fell within, stating:

> The people of our committee is delegated to represent are in fact and in all truth Indians.
>
> We have an organization here generally denominated a "band," and numbers perhaps two hundred-fifty to three hundred souls.
>
> Almost the entire percentage of the membership is composed of people of either half, or more, to full bloods.
>
> We are descendants of Potawatomis and should now be a participating fractional part of the original Nation in matters of annuities and land grants only that we have been barred and denied by the United States Government on grounds purely technical and superficial.
>
> The major portion of our members are *resident [sic] of the Counties of Allegan,* Berrien, Cass and Van Buren, of the State of Michigan, and St. Joseph County, of Indiana, while some of our members, in pursuit of livelihood are scattered about here and there in various other states.[164]

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164. Letter from Paul Knapp *et al.* to John Collier, Commissioner of Indian Affairs (Jan. 5, 1935) (emphasis supplied).

In January 1935, Senator Vandenberg continued to press the Department, including Secretary Harold Ickes, to act on behalf of the Potawatomis.[165] Soon after, in February 1935, Commissioner Collier forwarded the Potawatomis' correspondence to Mark L. Burns, Superintendent of the Consolidated Chippewa Agency for his consideration.[166]

3. Federal Inquiry into the Status of Lower Michigan Indians in the 1930s

Despite its mistaken view that the Band and other Indian tribes of southern Michigan were no longer its responsibility, the Department conducted, or received information from, several different inquiries of the status of the Indian tribes of the region, including the Band. It is clear from the historical record, for example, that social workers who were employed by the State of Michigan reported to federal officers at the Great Lakes and Tomah Indian Agencies. Between 1934 and 1940, federal records show the intervention of social workers, on behalf of the Federal Government, to assist tribes residing in Southern Michigan.[167]

In addition, inquiries into the eligibility of Potawatomis living in Michigan's Lower Peninsula to participate in the

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165. *See* Letter from A.H. Vandenberg to Harold L. Ickes, Secretary of the Interior (Jan. 4, 1935).

166. *See* Letter from John Collier to Mr. M.L. Burns (Feb. 27, 1935).

167. *See, e.g.,* Agnes Fitzgerald to Commissioner of Indian Affairs (Dec. 3, 1934).

IRA commenced in March 1935. Mark Burns was tasked with studying the Michigan Indian communities and reporting to the Commissioner of Indian Affairs about their status, including that of the Band, in relationship to the IRA. Olive Gwinn, a social worker, also investigated claims that the Potawatomis in Allegan County were being neglected by state and county welfare programs. She found that the Indians there indeed received little relief, but concluded that they were not the focus of anti-Indian discrimination; instead, budgets were simply too small to provide effective help for some counties.[168] As Gwinn would later report to the Federal Government, the State of Michigan withdrew all welfare services from Allegan County by the end of 1935 because the county government failed to raise mandatory matching funds.[169]

In a letter to the Commissioner dated May 4, 1935, superintendents Burns and Christy reported a "joint survey of conditions among the Michigan Indians under the Tomah [agency in Wisconsin] jurisdiction."[170] While

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168. *See* Letter from Olive Gwinn to John Collier (March 18, 1935).

169. *See* Social Worker's Monthly Report, Tomah Agency (Dec. 1935).

170. *See* Letter from M.L. Burns and Frank Christy to John Collier (May 4, 1935). The OIA officers visited the Lower Peninsula Potawatomis living at Athens, Dowagiac, Hartford, and Niles, but not the community living in Allegan County. Still, the agents observed:

> Pottawatomie of Southern Michigan—Acquisition of additional land adjoining the existing small reservation at Athens and formation of a community

purporting to survey the conditions of Indians there, the agents sought funding for the lands under the Rural Rehabilitation Corporation, because of the funding limitations under the IRA.[171] Burns and Christy stated that "[i]n view of the improbability that any of the necessary additional land for these Indians can be acquired under the Wheeler Howard Act, it is likely that this proposed program if carried out will have to be financed on a reimbursable bases by the Rehabilitation Corporation."[172]

Significantly, despite these limited appropriations, a memorandum prepared at the OIA central office on June 8, 1935, concluded that the "Potawatomis of Southern Michigan (near Athens, Dowagiac, Hartford, etc.)" were "under Tomah Jurisdiction."[173] Although these towns are not in Allegan County, this memorandum clearly illustrates the inconsistent attitudes of the United States towards the Potawatomis residing in Southern Michigan, including the Band.

> there consisting of Pottawatomis now scattered over several counties who wish to avail themselves of the opportunity offered them. The activities to be carried on would consist of gardening, subsistence farming, basket making, small fruit culture, to be supplemented by seasonal labor. The educational advantages of this locality are all that could be desired."

Id.

171. *Id.*

172. *Id.*

173. *See* Memorandum from Chief C. Porter for Tribal Organization (June 8, 1935).

In another example demonstrating the government's conflicting views towards the Lower Michigan Indians, an April 6, 1936, letter to the Commissioner from the OIA Superintendent at Cass Lake advised that the Ottawa and Chippewa Indians, who were persistent in their endeavors to be included in the IRA operations, were not a distinct band of Indians in Michigan, that they were not wards of the Federal Government, had not been wards for nearly a century, and that they had no land.[174] He recommended that the government either buy land and establish a reservation for them or inform them that they could not be considered under the IRA.[175] In his report, Burns also addressed the issue of whether the Michigan Indians would be eligible for organization as a community comprised of people with one half or more Indian blood, stating that:

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174. *See* Letter from M.L. Burns to John Collier (April 6, 1936). Burns stated, *inter alia*:

> Furthermore, these Indians have been citizens of the State of Michigan for many years—they are not wards of the federal government. The only time the federal government had jurisdiction over their welfare was during the time the Mount Pleasant Boarding School was in operation, at which time many of the Michigan Indian children received their early schooling at Mount Pleasant; while under the supervision of the boarding school these Indian children could have been classed as wards of the government. With this exception, these people have been citizens of the State of Michigan and come under the laws of the state.

Id.

175. *See id.*

> To determine the blood status of the Michigan Indians of "one-half or more Indian blood" as defined in the Act, will necessitate the employment of one or two men for at least one year to collect data and there is a question in my mind as to whether or not this information can be obtained with any degree of accuracy, because the reliability of this information will largely depend upon the honesty and integrity of the Indians themselves, since there are no census rolls from which this information might be obtained.

In describing the "distinct bands of Indians in Michigan," Burns also briefly acknowledged "the Potawatomi Band, living in five or six counties in the southwestern corner of the State of Michigan and numbering about 500."[176]

OIA officials in Washington expressed the same fiscal concerns and noted the limited services provided by the Federal Government to the Lower Peninsula Indians. On April 27, 1936, John Collier responded to an inquiry from Congressman Albert Engle on behalf of his Ottawa constituency, emphasizing that:

> The enactment of the Indian Reorganization act has taxed to capacity the efforts of a limited field force to ascertain the status of Indians in the Lake States, and especially these Indians of Michigan, many having been apparently

176. *Id.*

abandoned, some of whom can now be assisted through the Act.[177]

Likewise, on April 18, 1938, Collier wrote to Senator Wheeler regarding the Grand River Band of Ottawas, advising him that while the Department had not yet made a final decision whether to permit the Ottawas in Michigan to organize under the IRA due to the lack of funding, it was not disposed to make a final decision at that time.[178] This letter confirms that despite the "demands made upon [available funds] by Indians whom we really consider our responsibility," the government hesitated towards taking a position on the Indians residing in Southern Michigan because of a lack of money.[179]

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177. Letter from John Collier to the Hon. Albert J. Engel (April 27, 1936).

178. Letter from John Collier to the Hon. B. K. Wheeler (April 18, 1938). Collier stated:

> This particular group presents an unusual problem. While they may have rights under the Indian Reorganization Act when and if organized, they have for years been dealt with by the State authorities as have other citizens, receiving direct relief employment relief, health and educational facilities, etc. For the Indian Service to go among these people with inadequate funds and to attempt to take over functions and services which they are now receiving from the State and thereby disturb a definite social order in the community presents a real problem. It is a situation which we have hesitated to disturb.

Id.

179. *Id.*

Meanwhile, in May 1938, the "Pokagon Band of Pottawattomi Indians of Southwestern Michigan and northern Indiana" petitioned Collier to authorize the extension of the IRA to them. Members of that Band convened in a meeting and signed a letter asking the OIA to send an "organizer" to their community.[180] At least one of the signatories to that letter lived in Allegan County, which was home to the most distant community represented by the Pokagon committee. At the end of 1938, OIA officials attributed their failure to extend federal reorganization to the Potawatomis and the Ottawas to "limited funds made available from emergency appropriations" which were available only for "Indians who live on tribal or allotted land ...."[181]

4. The Holst Report and Withdrawal of Federal Services in Lower Michigan

A 1939 survey of the Indian groups in the State of Michigan undertaken by John H. Holst, Supervisor of Indian Schools, reported that the Indians in Michigan maintained no tribal organizations.[182] Holst's report identifies three groups in Lower Michigan: Pottawatomies (including the "Bradley group, consisting of 23 families

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180. *See* Letter from John Williams *et al.* to Commissioner of Indian Affairs (May 2, 1932 [sic]).

181. Letter from William Zimmerman, Jr., Assistant Commissioner for Indian Affairs to the Hon. Albert J. Engel (Dec. 29, 1938).

182. John Holst, A Survey of Indian Groups in the State of Michigan, at 4 (1939).

... scattered over twenty miles of country from Burnips to Shelbyville"), Chippewas, and the Ottawas located on the Lake Michigan coast of the Lower Peninsula.[183] Holst opined that their lands had been allotted previously, which immediately eliminated wardship status.[184] He then

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183. *Id.* at 4, 14. Holst explained that:

> Most of [the Potawatomis at Bradley] have land. Silas Bush near Middleville bought 80 acres for $750.00 and has plans for a comfortable home. He is building up rapidly. Stevens at Burnips has 85 acres, Church a well-farmed 40 acres, and several others have from on to 40 acres. Some baskets are made in this section, otherwise there are no native crafts.

Id. at 14.

184. Specifically, Holst recommended that:

1. The present understanding and arrangements between the Federal Government and the State of Michigan, relating to the general welfare and education of Indian children be continued, except that the sponsorship of the Federal Government may be diminished gradually as the State agencies extend their responsibilities for the common welfare of all citizens.
2. That the Indian Office shall not attempt to set up any additional or supplementary educational or welfare agencies for the Indians of lower Michigan that in any way tend to recognize Indians as a separate group of citizens.
3. That there be no further extension of organization under the Indian Reorganization Act in Michigan.
4. That steps be taken to abolish the prohibition on the sale of liquor to Indians in lower Michigan.

Id. at 21.

recommended no further extension of organization under the IRA in Michigan. Consistent with Holst's 1939 survey, Walter V. Woehlke, the Assistant to the Commissioner of Indian Affairs, "prepared a memorandum to COIA John Collier recommending withdrawal of BIA activities from Lower Michigan."[185]

The Holst Report, however, was not a formal position of the Department and there were strenuous objections to Holst's report by government officers indicating that the Michigan Indians were actually in need of assistance. For example, in his letter to John Collier, Peru Farver, the Tomah Superintendent stated:

> This issue will be kept alive for many years in view of the fact that most of the groups in the upper peninsula have been recognized and we are likewise contributing to the Chippewas in Lower Michigan. In other words, the Ottawas and Potawatomis are the only tribes in Michigan which have been denied assistance under the Indian Reorganization Act. There are some 35 Ottawa and Potawatomie children receiving Boarding Home Care and public School Assistance at this time and so far as I know none have been denied enrollment in Government boarding schools on the basis of belonging to these tribes. The fact that we are rehabilitating all other groups in the state and are granting certain benefits to these two tribes

185. Technical Report, at 132.

> keeps alive a ray of hope and a realization that there is an Indian Service.
>
> The State is exercising and the Indian is accepting, State jurisdiction. However, it is believed legislation should be enacted granting State jurisdiction on Government-owned and restricted Indian lands. There is every reason to believe that State jurisdiction will eventually be questioned in those areas where we hold restricted lands and have purchased IRA land.
>
> If it should be decided that no assistance is to be given the Ottawa and Potawatomies of Lower Michigan then it would seem that a definite statement of the policy to that effect should be made.[186]

Recognizing that these tribes were being treated unequally for policy reasons, Farver nonetheless fully agreed that "no further extension of organization under the Indian Reorganization Act should be made in Lower Michigan and that no action tending to designate these people as a separate group should be taken."[187]

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186. Letter from Peru Farver, Superintendent, Tomah Indian Agency, Tomah Wisconsin, to the Commissioner of Indian Affairs, Washington, D.C., Attention: Fred H. Daiker (Dec. 1, 1939).

187. *Id.* (noting the deplorable housing facilities of some Indians and expressing hope that through the Holst Report "some plan would be developed through State and Federal cooperation to improve the living conditions of many of these people.").

In addition, OIA staff proposed subsidizing state activities and allowing state offices to administer federal rehabilitation programs to the Potawatomis and other groups in Lower Michigan, such as the Michigan Work Project Administration ("WPA") Indian Arts and Crafts Project.[188] The Band benefitted from this endeavor, which enlisted eleven Bradley Settlement basketmakers for the project, as reported by Olive Gwinn.[189] To that end, the Technical Report notes that "[a] good, if terse, summation of the situation at the end of the 1930's was presented in the WPA Guide, Michigan—A Guide to the Wolverine State, published under the Writers' Program of the W.P.A."[190]

Notwithstanding these efforts on behalf of the Band, on May 29, 1940, Collier advised all of the OIA superintendents for the Lake States Region that the Indian Office had adopted the recommendations of the Holst report. Collier further recommended:

1. That the present understanding and arrangements between the Federal Government and the State

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188. *See, e.g.*, Letter from J.C. Cavill to the Commissioner of Indian Affairs (Oct. 26, 1939).

189. See Letter from Olive Gwinn, OIA Field Service, to Katherine Foley, State Supervisor of Indian Arts and Crafts Projects (Sept. 20, 1939).

190. Technical Report, at 133. The W.P.A. publication stated that at the "Bradley Indian Settlement ... 75 Indians of the Ottawa, Potawatomi, and Chippewa tribes have built their community around a church and mission. Many of them have attended Indian schools, and only the older members can speak their native tongue." *Id.*

of Michigan relating to the general welfare and education of Indian children be continued, except that the sponsorship of the Federal Government may be diminished gradually as the state agencies extend their responsibilities for the common welfare of all citizens.

2. That there be no further extension of Organization under the Indian Reorganization Act in Lower Michigan.

3. That the Indian Office shall not attempt to set up any additional or supplementary educational or welfare agencies for the Indians of Lower Michigan that in any way tend to recognize Indians as a separate groups of citizens.[191]

As a consequence of this directive, the IRA was not implemented in Lower Michigan.

In sum, the failure of the Federal Government to fully implement the IRA in Lower Michigan in the 1930s was primarily the result of policies relating to a lack of adequate funds, which contributed to a diminishment in federal services to the Band. Such policies can have no impact on the legal relationship established with the United States through treaties and other course of dealings.

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191. Letter from John Collier, Commissioner of Indian Affairs to Superintendent J.C. Cavill, Superintendent Peru Farver, Superintendent Frank Christy, School Social Worker Olive Gwinn, Field Agent Archie Phinney (May 29, 1940).

Even with minimal services provided by the government during the 1930s, the historical record makes clear that the Federal Government was aware of the Band, which was still residing in Allegan County at that time. Moreover, federal agents and social workers made numerous investigations and reports on the Lower Michigan Potawatomis, including the Band. The OIA still received proposals on how to best rehabilitate Lower Peninsula tribes such as the Band, including through the federal WPA Indian crafts project, despite the government's disavowal of its responsibilities to these groups. And in any event, it would have been unnecessary for Commissioner Collier to issue a policy in 1940 to formally withdraw services from the Indian tribes of southern Michigan unless the Department had an obligation to provide services to such tribes.

5. Summary

Notwithstanding the confusing correspondence and erratic administrative treatment by certain officials within the Department, the Band continuously existed under federal jurisdiction during and after 1934. As the Solicitor has opined:

> It should be noted ... that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status. And evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke

> jurisdiction absent express congressional action. Indeed, there may be period where federal jurisdiction exists but is dormant. Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.[192]

It is well-settled that only Congress has the authority to terminate the federal relationship with the Band, once that relationship is established.[193] The administrative actions or inactions of the Department could not legally terminate the federal relationship with the Band.[194] We have stated before that neither federal denials of requests for assistance, nor occasional misstatements from government officials results in the repudiation of federal jurisdiction.[195] In addition, occasional misstatements by Department officials do not by themselves terminate federal jurisdiction over a tribe.[196]

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192. M-Opinion, at 20.

193. *See id.* at 20 n. 123 (citing *United States v. John*, 437 U.S. 634, 653 (1978).

194. *See id.* 20 n. 122 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1]). *See also United States v. Long*, 324 F.3d 475, 479-80 (7th Cir. 2003); *Hargo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

195. *See* Cowlitz ROD, at 95.

196. *See generally Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring) (recognizing that a tribe may have been under federal

The Band's situation, while not the same, is akin to the Department's treatment of the Stillaguamish Tribe. In the Stillaguamish Memorandum, the Associate Solicitor concluded that previous Departmental findings regarding the Stillaguamish did not preclude IRA applicability upon reversal of the earlier findings.[197] To the contrary, the memorandum found that "[a]lthough the United States was apparently unaware in 1934 that it had a continuing obligation to protect the Stillaguamish treaty fishing rights, those rights put the Stillaguamish 'under federal jurisdiction' for purposes of the IRA."[198] However, in the case of the Band, Congress openly corrected the Department's treatment of similarly situated tribes in

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jurisdiction in 1934 even though the Federal Government did not believe so at the time).

197. *See* Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, *Request for Reconsideration of Decision Not to Take Land into Trust for the Stillaguamish Tribe* (Oct 1, 1980) ("Stillaguamish Memorandum"). The Stillaguamish Memorandum concluded that the Secretary could take land into trust for the Stillaguamish, because:

> it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a "recognized tribe now under Federal jurisdiction" and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability.

Id. at 7. *See also* M-Opinion, at 23 (discussing the Stillaguamish Tribe).

198. Stillaguamish Memorandum, at 2, 7.

Michigan and affirmed that they had continuous dealings with the United States Government from treaty times until the present.[199]

As Justice Breyer noted in *Carcieri,* a particular tribe, in this case the Band, may have been under federal jurisdiction in 1934 even though the Department did not realize it at the time.[200] The Solicitor has noted that Justice Breyer's concurrence in *Carcieri v. Salazar*:

> specifically cited to specific tribes that were erroneously treated as not being under federal jurisdiction by federal officials at the time of the passage of the IRA, but whose status was later recognized by the Federal Government. Justice Breyer further suggested that these later-recognized tribes could nonetheless have been "under federal jurisdiction" in 1934 notwithstanding earlier actions or statements by federal officials to the contrary. In support of these propositions, Justice Breyer cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under federal jurisdiction in 1934, but which nevertheless exhibited a "1934 relationship between the tribe and Federal Government that could be described as jurisdictional."[201]

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199. *See* 25 USCS § 1300j; 25 USCS § 1300k.

200. *Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring).

201. M-Opinion at 3 (citing *Carcieri,* 555 U.S. at 397-99 (Breyer, J., concurring)).

In sum, the Department acted without Congressional authority in determining, based on budgetary concerns, to withdraw services from the Indian tribes in southern Michigan, including the Band. These policy decisions did not relieve the Department of its ongoing obligations to the Band even if the Department believed they did at the time.

Accordingly, despite the fact the Department greatly reduced its services and overlooked its obligations to the Band, we thus determine that the United States' jurisdiction over the Band remained intact.

II. Conclusion

Based on the record as a whole, the Band meets both prongs of the two-part inquiry set forth above. The Band unquestionably was under federal jurisdiction prior to 1934, thus meeting the first prong. The Band entered into a succession of treaties and other course of dealings with the United States beginning by at least 1795. In 1890, Congress specifically granted jurisdiction to the U.S. Court of Claims, after which Potawatomi bands, including the Gun Lake Band, sued the United States to account for these treaty obligations. In 1904, the Department derived the Taggart Roll, which included the Potawatomi living in Allegan County, for distributing the favorable Court of Claims judgments.

Correspondence between Interior and Indian tribes in Lower Michigan during the 1930s, albeit confusing and conflicting, reflected a policy position premised on lack of funding. Nothing in the record indicates that

Congress terminated its relationship with the Band, and the Department's sporadic inaction regarding the Band does not effectuate a termination of the Band's under-federal-jurisdiction status. Indeed, the Department's inaction towards Lower Peninsula tribes during that time period was due primarily to a lack of operational funding, and a misinterpretation of the IRA, that led the Department to justify inaction on the Lower Peninsula. The Department's actions also were premised on a misinterpretation of treaty language (later corrected by Congress and the federal courts). Neither the inaction nor the misinterpretation of the treaty language altered the Department's obligations to the Band. As a legal matter, the Department's gradual withdrawal of federal services to the Band did not terminate United States' overarching jurisdiction over the Band, because it is well-settled that only Congress can sever jurisdiction through an express action. The second prong of the inquiry is met because the Band's under federal jurisdiction status remained intact in and after 1934. A determination that the Secretary is authorized to take land into trust for the Band under Section 5 of the IRA is thus consistent with the Supreme Court's decision in *Carcieri*.

25 CFR § 151.10(b) – The need of the Tribe for additional land

The Tribe's need for additional land is evident by the current land holdings of the Tribe. The United States currently holds 146 acres of land in trust for the benefit of the Tribe, which constitutes the Gun Lake Tribe's reservation. The Tribe seeks further trust land holdings to meet the needs of their membership and governmental

operations. Trust status protects these lands from alienation and gives the Tribe opportunity to manage and practice jurisdiction over their lands which compliments the arena of self-governance and self-determination.

25 CFR § 151.10(c) – Purpose for which the land will be used

The Jijak Camp is currently used for cultural and religious purposes associated with the Jijak Foundation's non-profit activities.

The Settlement is comprised of nine tribal housing units managed through the Band's housing Department.

The use of these lands will not change with trust status.

25 CFR § 151.10(e) – Impact on the State and Local governments resulting from the removal of the land from the tax rolls

The Notice of Application (NOA) allows the State and local governments 30 days to submit comments regarding a proposed trust acquisition, in the areas of regulatory jurisdiction, real property taxes and special assessments.

On March 14, 2014, notice of the Jijak application for trust status was mailed via certified mail to the Governor of Michigan, Allegan County and Hopkins Township. In addition to the initial 30 day period provided for comment by the regulations, the comment period was extended allowing an additional 30 days to both the Governor and the Township at their request.

Appendix G

Correspondence dated May 16, 2013 was received by the Michigan Agency from John K. Lohrstorfer, Attorney acting in behalf of the Hopkins Township. Attorney Lohrstorfer, states in the correspondence, the current property taxes, which at that time totaled $27,011.72 with a delinquent amount of $22,524. He adds a general statement in response to impacts of the political subdivision, "Loss of property taxes and State of Michigan revenue sharing would generate to fire, ambulance, police, library, schools and roads services," but does not substantiate any detail for further consideration in our analysis, to depict what those impacts specifically or realistically are. Although we do find the following provided by the Band:

- The Winter 2013 and Summer 2014 property tax total is approximately $28,475.46. (The Winter 2014 tax is not yet available.) We find illustrated in the tax statements, the millage is split between County Op and the State Ed Tax, almost equally, however the Town's share is not shown. We don't find any information to show that the Town would be losing out on the full amount being taxed.

- There is not a long standing history of property tax revenue for the Jijak Camp property as it was owned and operated by two religious organizations for the past 30 years prior to purchase by the Jijak Foundation in 2010. It was at that time, the property was placed back on the tax rolls.[202]

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202. E-mail from Zeke Fletcher, Tribal Attorney, dated July 25, 2014.

In this same correspondence, in response to the opportunity to identify "Any special assessments, and amounts thereof, which are currently assessed against the property," Attorney Lohrstorfer simply states "Drain Assessments and Recycling Assessments" with no other information to substantiate the claim. The Attorney adds, "However depending on what develops on the property, there could be special assessments for water, sewer, utilities, etc."

- The information provided in the comments submitted on behalf of the Town is limited, with nothing to substantiate the claim of drain and recycling assessments, nor are there amounts stated. The tribe on the other hand, in their response to the comments submitted on behalf of the Town, discusses a recycling assessment of $25.00.

- The comment made in the Town's behalf with respect to what might be developed on the property is purely speculative and we are therefore non-responsive in that regard.

In addition, Attorney Lohrstorfer, responds to "Any governmental services which are currently provided to the property by your jurisdiction," by stating, "General governmental services for the property include, fire protection and police protection, library service, recycling service and ambulance services. At this time there is no current contract or discussion with Hopkins Township to provide any of these governmental services."

- The Tribe states it is prepared and able to provide its own police service to the parcel in addition to support by Allegan County pursuant to the Cross-Deputation Agreement already referred to.

- The Tribe adds it has established an agreement with Wayland Area Emergency Services (WAEMS) to provide Ambulance Services.

- The Tribe continues to remain pro-active in their desire to establish agreements for services and has provided a proposed agreement to the Hopkins Area Fire Department and Fire Board, which remains in pending status.[203]

- The town of Hopkins doesn't have a fire or police Department *per se,* however the town of Wayland continues to provide fire protection.[204]

Finally, in the response to "Describe the current zoning classification and any potential conflicts of land use which may arise," Attorney Lohrstorfer did note the following:

"At this time a small part of the community is zoned R-1. The majority of the property is in the R-2 classification. R-1, Rural Estate district uses include farms, greenhouses, orchards, single-family dwellings, parks and cemeteries. In addition, special use permits would be needed for any home occupation, removal and processing of the top soil,

203. Correspondence from the Tribe dated June 14, 2013.

204. Correspondence from the Tribe dated July 22, 2014.

sand, gravel and kennels. R-2, Low Density Residential districts include single-family and two-family dwellings. Special Use Permits are needed for schools, libraries, parks, playgrounds, community centers, governmental service buildings, churches and home occupations. The historical use of the property has been that of a seasonal church camp and related recreational activities associated with the camp. We believe this camp was created prior to the adoption of the Township Zoning Ordinance and therefore would not constitute a legal non-conforming use. To the extent that the property remains a camp use, there would not be any conflict. However, if the property is to be used other than a camp and not consistent with the residential uses, then there would be a potential conflict. One of the issues for the Township is that no plan for future development has been presented to the township. At this time the Township does not know exactly what the uses may be in the future for the property. To that extent, certain uses could be in conflict with the zoning classifications. Therefore, we cannot comment on what the issues in the future may be."

- There is no disagreement with regard to the zoning status of this property as R-1 and R-2. However, we will point out, the proposed use as stated by the Tribe, depicts no change in use for this property in trust status, therefore, the discussion by Attorney Lohrstorfer with regard to any other use is purely speculative in nature without any reason or factual information to substantiate. The Tribe continues to state their proposed use, as no change to the existing use, and adds in their consideration of the

> Town's comments regarding the use of the Camp property, "... a camp to promote charity to those in need and education of the Tribe's cultural and religious aspects to other Native Americans and the general public."[205]

In their May 28, 2013 correspondence the State of Michigan Governor's Office asked, "... does the Department anticipate providing an explanation as to whether the Gun Lake Tribe was under federal jurisdiction as of 1934?"

- To summarize what is stated in a larger context at Section § 151.10 (a) above, the Band unquestionably was under federal jurisdiction prior to 1934, and the Band's "under federal jurisdiction" status remained intact in and after 1934. Our determination that the Secretary is authorized to take land into trust for the Band under Section 5 of the IRA is thus consistent with the Supreme Court's decision in *Carcieri.*

Notice of Application for the Settlement property was mailed June 5, 2012 to the Governor of Michigan, Allegan County and Wayland Township. Each had 30 days from the date of delivery to provide responsive comments.

Comments were received June 29, 2012 from Wayland Township in which the Town states the taxes currently levied at $19,376.50, "As all the affected parties are also part of the Inter Local Agreement which receives monies

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205. Tribal Response June 14, 2013.

as part of the revenue sharing from the Tribe's casino, there should be no adverse effect" and there are no special assessments. Police and fire protection are provided and police costs are covered by revenue sharing. Zoning was addressed as part of the PUD (Planned Unit Development) and is in compliance. The Town also expressed their pleasure working with the Gun Lake Tribe over the years, pointing out, that together they have been able to do great things for the area. The Town also expressed the trust and friendship that has grown through the years through the Tribe's efforts to make life better for the residents of Wayland township and surrounding areas.

We note the 2014 property tax is $25,236.67 and payment is current.

The state responded June 27, 2012 to present concern raised by the state's boundary expert regarding the subject property legal description. The Midwest Regional Office, Bureau of Land Management (BLM) surveyor worked through resolution with the state and on August 16, 2012, the BLM surveyor stated resolution of their concerns and had no official comments regarding the subject acquisition.[206]

The County of Allegan did not respond to the Notice of Application in either matter.

The Tribe notes services required for the Settlement and the Camp are limited to Fire and EMS services. The Tribe

206. State of Michigan email August 16, 2012.

has submitted and continues to pursue an agreement with the Hopkins Area Fire Board and in the meantime, the agreement they have in place with the Wayland Area Fire Department will cover all trust parcels through the mutual aid agreement between the various townships. The Tribe also has a Public Works Department to address utilities, roads, etc.

25 CFR § 151.10(f) – Jurisdictional problems and potential conflicts of land use which may arise

There is no change in use of either property to support potential conflict of land use, nor have jurisdictional problems been identified or presented by any of the parties notified for comment or otherwise to cause concern. Weight is given to the "Cross-Deputization Agreement[207] Between Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and the Allegan County Sheriff Department of Michigan" which extends deputization to Gun Lake Tribal Police allowing the officers to enforce both state and tribal law on Tribal trust lands. The County and Tribe continue to collaborate to maintain and promote effective law enforcement for all those present in the county. The Tribe notes the tribal police actively patrol the Jijak camp pursuant to the Cross-Deputization Agreement.

25 CFR § 151.10(g) – Whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

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207. Cross-Deputization Agreement dated April 1, 2011, on file with the Bureau of Indian Affairs.

This trust acquisition will result in increased tribal self-sufficiency and, ultimately, less dependence on the Interior Department. Furthermore, acceptance of the subject parcel into Federal trust status will not impose any significant additional responsibilities or burdens on the BIA beyond those already inherent in the Federal trusteeship over the existing Reservation. The property has no forestry or mineral resources, which would require BIA management. With no leases, rights of ways or any other trust transactions anticipated, any additional responsibilities resulting from this transaction will be minimal. As such, the Bureau of Indian Affairs, Michigan Agency, is equipped to administer any additional responsibilities resulting from this acquisition.

25 CFR § 151.10(h) – Compliance with 516 DM 6, appendix 4, National Environmental Policy Act and 602 DM 2, Hazardous Substances Determinations

In accordance with Interior Department Policy (602 DM 2), we are charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability for, hazardous substances or other environmental remediation or injury. The record includes an update to the Phase 1 Environmental Site Assessment which was approved by the Regional Director on August 7, 2014.

NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE

An additional requirement, which has to be met when considering land acquisition proposals, is the impact upon

the human environment pursuant to the criteria of the National Environmental Policy Act of 1969 (NEPA).

The actions listed therein have been determined not to individually or cumulatively affect the quality of the human environment, and therefore, do not require the preparation of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). A categorical exclusion requires a qualifying action; in this case, 516 DM 6, Appendix 4, part 4.4.I., Land Conveyance and Other Transfers of interests in land where no immediate change in land use are planned. This acquisition is for 201.07 acres with no change in land use anticipated, therefore, qualifies as a categorical exclusion.

25 CFR § 151.11 – OFF-RESERVATION ACQUISITION – ADDITIONAL REQUIREMENTS

Factor 1 – The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation [25 CFR § 151.11(b)]

The Jijak Camp is located approximately 5 miles and the Settlement 3 miles from the Tribe's initial reservation, and both approximately 100 miles from the Southern border of Michigan.

Factor 2 – Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use. [25 CFR §151.11(c)]

The Jijak Camp nor the Settlement property are being acquired for business purposes, so therefore the requirements of this regulation are not applicable to the Tribe's request.

Factor 3 – Contact with State and Local governments having regulatory jurisdiction over the land to be acquired [25 CFR § 151.11(d)]

Refer to Section § 151.10(e) above.

40 USC § 255/25 CFR part 151.13

The Department of Justice (DOJ) is authorized to approve the title in Land Acquisitions on behalf of the United States (25 CFR § 151.13). Pursuant to 40 USC § 255, the Regional Solicitor, Midwest Region, has rendered title opinions as to the encumbrances on the subject title, and that they will not jeopardize the interest of the United States. The Tribe provided an updated title commitment dated June 17, 2014.[208]

Based on the above information, the Regional Director has decided to approve the taking of this land into trust status for the benefit and welfare of the Match-E-Be-Nash-She-Wish Band of Pottawtomi Indians, provided the tribe delivers a marketable title to the property, and in a manner as required in 25 CFR § 151, Land Acquisition regulations.

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208. Commitment for Title Insurance dated June 17, 2014, on file with the Bureau of Indian Affairs.

Appendix G

This decision may be appealed to the Interior Board of Indian Appeals, 801 North Quincy Street, Suite 300, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR § 4.310-4.340 (copy attached). Your notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed to the (1) the Assistant Secretary - Indian Affairs, 1849 C Street, N.W., Washington, D.C. 20240; (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal. If you have any questions regarding this matter, please contact this office at (612) 725-4500.

Sincerely,

/s/_____

Diane K. Rosen
Regional Director

APPENDIX H

DECLARATION OF DAVID K. SPRAGUE, IN SUPPORT OF INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DATED OCTOBER 31, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:08-CV-01331

DAVID PATCHAK,

Plaintiff,

vs.

SALLY JEWELL, SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant.

Hon. Richard J. Leon

Appendix H

DECLARATION OF CHAIRMAN DAVID K. SPRAGUE IN SUPPORT OF INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. The information contained herein is based upon my personal knowledge, and I am competent to testify to the matters herein if called to do so in any proceeding.

2. I reside at 1642 Parker Drive, Wayland, Michigan 49348, and have resided there for twelve years. My residence is about five miles from the 147-acre parcel at issue in this case.

3. I am the duly elected Chairman of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, a federally-recognized Indian tribe commonly known as the "Gun Lake Tribe" (hereinafter "Tribe" or "Gun Lake Tribe"). I have served in this capacity for twenty-two years.

4. In my capacity as Chairman, I am the primary representative of the Tribe and preside over the Tribe's governing body, the elected Tribal Council. As a member of the Tribe and as the Tribe's Chairman, I have knowledge of the Tribe's history, its legal status, its finances, and its business operations.

5. The Tribe has existed from time immemorial and entered into numerous treaties with the United States early in its history. However, the Tribe lost all of its land during the 19th century. The Tribe suffered from

this dispossession, but it maintained its sovereign character, nationhood, culture, and community.

6. In 1998, the Tribe successfully won affirmation of its existing sovereignty from the United States, but it still did not have any reservation or trust lands. Without land, the Tribe struggled to support our government and our people. Our people and our community suffered high unemployment and rates of poverty.

7. Therefore, in approximately 2001, the Tribe identified a 147-acre tract of land to acquire for the establishment of its gaming and entertainment facility. This land is comprised of two adjacent parcels totaling 147.48 acres. Both parcels are located in the Township of Wayland, County of Allegan in the State of Michigan. One of the parcels is commonly known as "1123 129th Avenue, Bradley, Michigan." Both parcels are collectively referred to as "the Bradley Tract." The Bradley Tract is located less than three miles from lands the Tribe has historically occupied.

8. On August 8, 2001, the Tribe requested that the Secretary of Interior accept the Bradley Tract into trust for the benefit of the Tribe. The Tribe also requested that the Secretary proclaim that the Bradley Tract is the Tribe's initial reservation for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(ii).

9. During the lengthy administrative process that followed, hundreds of comments were received from

the general public, local organizations, governments, and government officials (including supporters and opponents of the project).

10. The BIA published notice of the Secretary of the Interior's decision to take the Bradley Tract into trust on May 13, 2005. 70 Fed. Reg. 25,596. The notice provided interested parties with thirty days from the date of the notice to appeal the decision.

11. Shortly after the Secretary's final decision, on June 13, 2005, an anti-gambling organization called Michigan Gambling Opposition ("MichGO") filed a lawsuit against the United States to stop the Secretary from taking the Bradley Tract into trust. The U.S. District Court for the District of Columbia granted the Tribe's motion to intervene in that matter on September 1, 2005. On February 23, 2007, the District Court dismissed MichGO's claims in their entirety. MichGO then appealed to the District of Columbia Circuit Court of Appeals, and the Court issued an opinion on April 29, 2008 affirming the District Court. The Court of Appeals denied MichGO's Petition for Rehearing on July 25, 2008.

12. The plaintiff in this case, David Patchak, was not a named party to the MichGO suit, though on information and belief, he was either a member of MichGO or was closely affiliated with MichGO.

13. On August 1, 2008, David Patchak filed this lawsuit challenging the Secretary's decision to take the

Bradley Tract into trust, alleging that the United States did not have authority to take the Bradley Tract into trust as the Tribe did not constitute an "Indian Tribe" under Sections 5 and 19 of the Indian Reorganization Act. This theory was similar to one that MichGO unsuccessfully tried to bring in its Petition for Rehearing.

14. The Secretary of the Interior took the Bradley Tract into trust in January 2009 after the United States Supreme Court declined to grant MichGO's Petition for Certiorari to that Court.

15. This Court dismissed Patchak's suit for lack of standing to bring this suit. Patchak then appealed to the Court of Appeals, which resulted in a ruling from the United States Supreme Court that Patchak had standing to sue. This decision issued on June 18, 2012. The United States Supreme Court remanded the case to this Court to consider the merits of Patchak's suit.

16. Mr. Patchak did not take any action in this Court to pursue his claims for over two years following the Supreme Court's decision.

17. In the meantime, the Tribe's dire economic need compelled the Tribe to proceed with pursuing economic development in the Bradley Tract, which had been taken into trust in 2009.

18. Therefore, the Tribe invested hundreds of millions of dollars into the construction and development

of the gaming facility on the Bradley Tract in accordance with the Indian Gaming Regulatory Act, including accruing debt in that totaling approximately One Hundred Ninety Five Million Dollars ($195,000,000.00), of which approximately Fifty Four Million Dollars ($54,000,000) remains unpaid. Also, the Tribe negotiated a Tribal-State Gaming Compact ("Compact") with the Governor of the State of Michigan pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(1)(c). The Compact was subsequently approved by the Michigan legislature, and then approved by the Secretary of the Interior on April 22, 2009. 74 Fed. Reg. 18397-98 (April 22, 2009). The Compact provides, *inter alia*, that the Tribe will share revenues from its casino with State and local governments.

19. After years of preparation and significant expenditures, the Tribe was finally able to open the gaming facility on February 10, 2011.

20. Revenues from operation of the gaming facility have allowed the Tribe to offer the basic functions of the Tribe's government and has enabled the Tribe to provide essential services to its members, including housing, healthcare, education, infrastructure, language and cultural preservation, and other critical social programs essential to fostering and preserving the health and well-being of the Tribe and its members. The income from the gaming facility is the Tribe's primary source of revenue.

21. Since the gaming facility's opening in 2011, the Tribe has contributed approximately $52,235,219.00 to state and local revenue sharing boards in accordance with its Compact with the State of Michigan. The Tribe, along with State and local governments, have made substantial financial and future planning commitments based upon continued casino revenues.

22. Additionally, the gaming facility project has provided over 1,000 jobs, making it one of the largest employers of Allegan County, including tribal members as well as non-tribal members.

23. The gaming facility's operation has also permitted the Tribe to give generously to charities since the facility's opening.

24. The gaming facility's unimpeded operation will allow the Tribe to continually provide funds and other services to those members of the community, both tribal members and non-tribal members, who depend on the Tribe to provide them.

I swear under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

October 31, 2014
Dated

/s/
Chairman David K. Sprague

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUL 12 2017
OFFICE OF THE CLERK

No. 16-498

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land (the "Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (*Patchak I*), 567 U.S. 209, 212 (2012).

While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case "relating to" the Bradley Property "shall be promptly dismissed," but did not amend any underlying substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

> Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?

PARTIES TO THE PROCEEDING

Petitioner is David Patchak, the plaintiff below.

Respondents are Ryan Zinke, Secretary of the Interior, and Michael S. Black, Acting Assistant Secretary of the Interior, as well as the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below. The predecessors of Mr. Zinke (Sally Jewell) and Mr. Black (Lawrence Roberts) were defendants below.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit was issued on July 15, 2016, is reported at 828 F.3d 995, and is reproduced in the Joint Appendix at JA 24.[1] The D.C. Circuit's July 15, 2016 Judgment is reproduced at JA 46.

The June 17, 2015 Opinion of the United States District Court for the District of Columbia is reported at 109 F. Supp. 3d 152, and is reproduced at JA 50.

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[1] References to the Joint Appendix are in the form "JA 1."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit issued its opinion and entered judgment on July 15, 2016. JA 24-45; JA 46. The Petition for a Writ of Certiorari was filed on October 11, 2016, and granted on May 1, 2017.

CONSTITUTIONAL & STATUTORY PROVISIONS

This case concerns the constitutionality of the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913, and whether it violates separation of powers principles. The text of the Gun Lake Act and relevant constitutional provisions are reproduced in the Joint Appendix.[2] JA 72-74.

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[2] Although the Joint Appendix contains only portions of Article III (and Article I), as the Court has observed: "the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of . . . the structural imperatives of the Constitution as a whole." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982); *see also Marshall v. Gordon*, 243 U.S. 521, 536 (1917) ("[T]he distinction between legislative, executive and judicial authority . . . is interwoven in the very fabric of the Constitution.").

STATEMENT OF THE CASE

A. Petitioner's Complaint in the District Court

On April 18, 2005, the Department of the Interior announced its intention to employ the Secretary's authority under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, to take into trust land (the "Bradley Property") for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe"). 70 Fed. Reg. 25,596 (May 13, 2005). The Gun Lake Tribe had been recognized by the Department of the Interior in October 1998. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1998).

Petitioner is a resident of Wayland Township, Michigan, who lives in close proximity to the Bradley Property. On August 1, 2008, he filed a complaint in the United States District Court for the District of Columbia, asserting a claim under the Administrative Procedure Act (APA) against the then-Secretary and Assistant Secretary of the Interior, challenging the Secretary's authority under the IRA to take the Bradley Property into trust for the Gun Lake Tribe.[3] Petitioner argued that acquisition of the Bradley Property for the Gun Lake Tribe (which had not yet occurred because of unrelated litigation following the announcement of the Interior Secretary's intentions) was unauthorized by the IRA because the Tribe had not

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[3] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

been recognized and "under federal jurisdiction" when the IRA was enacted in 1934. The Gun Lake Tribe filed a motion to intervene, which was granted by the District Court.

While Petitioner's case was pending in the District Court, on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Gun Lake Tribe. *Patchak I*, 567 U.S. 209, 213-14 (2012).

Less than a month after the Bradley Property was taken into trust by the Secretary, this Court issued its decision in *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), holding that the IRA "limits the [Interior] Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

Although *Carcieri* cast substantial doubt on the legality of the Secretary's action taking the Bradley Property into trust for the Gun Lake Tribe, which had obtained federal recognition in 1998, the District Court did not reach the merits of Petitioner's APA claim. Instead, on August 19, 2009, the District Court issued an opinion finding that Petitioner lacked prudential standing, and contemporaneously issued an order granting the United States' motion to dismiss and the Gun Lake Tribe's motion for judgment on the pleadings. *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009).

On appeal, the D.C. Circuit reversed the District Court's dismissal of Petitioner's APA claim, finding he had both prudential and Article III standing. *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). The D.C. Circuit also addressed the question of sovereign immunity briefed by the parties, but not decided by the District Court, concluding that sovereign immunity had been waived. *Id.* at 712.

B. This Court's Prior Decision in this Case

This Court granted certiorari, 565 U.S. 1092 (2011), to review two questions arising from Petitioner's lawsuit: whether the United States had sovereign immunity by virtue of the Quiet Title Act, 86 Stat. 1176, and whether Petitioner had prudential standing to challenge the Interior Secretary's acquisition of the Bradley Property. The Court determined that sovereign immunity had been waived and that Petitioner had prudential standing, and "therefore h[e]ld that Patchak's suit may proceed." *Patchak I*, 567 U.S. at 212.

C. Congress's Action to Terminate Petitioner's Lawsuit

Following this Court's decision in *Patchak I*, while Petitioner's case was moving forward in the District Court, Congress took up consideration of what became the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913.[4]

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[4] The full text of the statute is reproduced at JA 73-74.

Section 2(a) provides:

> IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

Section 2(b) provides:

> NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.[5]

The bill that became the Gun Lake Act originated in the Senate, as S. 1603, with a single sponsor and one co-sponsor (both Senators from Michigan, where the Bradley Property is located).

The Senate Committee on Indian Affairs held a hearing during May 2014. At that hearing, the Gun Lake Tribe's Chairman urged passage of the bill because the trust status of his Tribe's land "is now threatened by a U.S. Supreme Court opinion [*Patchak I*] that has allowed one individual to challenge the authority of the Secretary of Interior to

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[5] The statute does not contain a severability provision.

take land into trust for our Tribe," and because "it is now time for this dispute to come to an end." *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509, at 55 (2014) (statement of David K. Sprague).

At the same Senate hearing the Assistant Secretary–Indian Affairs from the Department of the Interior also pressed for enactment of the bill, contending that this Court's decision in *Patchak I* "undermines the primary goal of Congress in enacting the Indian Reorganization Act" and "imposes additional burdens and uncertainty on the Department's long-standing approach to trust acquisitions . . . ." The Assistant Secretary expounded on his criticism of this Court's opinion in *Patchak I*, opining on the need for "legislation to address *Patchak*." *Id.* at 9 (statement of Kevin Washburn).

The Senate Report addressing the bill observed that Petitioner's lawsuit "currently pending before a federal district court . . . places in jeopardy the Tribe's only tract of land held in trust . . . . The bill would provide certainty to the legal status of the land" and "would extinguish all rights to legal actions relating to the trust lands." S. Rep. No. 113-194, at 2, 3 (2014). The Report also stated that enactment "will not make any changes in existing law." *Id.* at 4.

The Senate approved S. 1603 by voice vote on June 19, 2014.

The legislation then moved to the House, where the Subcommittee on Indian and Alaska Native Affairs held a hearing during July 2014. At that

hearing, the Gun Lake Tribe's Chairman and the Assistant Secretary–Indian Affairs provided testimony substantively identical to their testimony before the Senate Committee on Indian Affairs. *See Legislative Hearing on S. 1603 Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources* (July 15, 2014) (statement of David K. Sprague) (testimony of Kevin Washburn).

The House Report addressing the bill observed "[t]he need for S. 1603 stems from what is now understood to be a likely unlawful acquisition of land by the Secretary for the Gun Lake Tribe," and "S. 1603 would void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property . . . filed by a neighboring private landowner named David Patchak." H.R. Rep. No. 113-590, at 2 (2014). The House Report also noted that "S. 1603 is necessary because there is no consensus in Congress on how to address *Carcieri* [555 U.S. 379 (2009)]," and—like the Senate Report—stated that enactment "would make no changes in existing law." *Id.* at 2, 5.

On September 16, 2014, the House voted 359-64 in favor of the bill.

The President signed the Gun Lake Act on September 26, 2014. 128 Stat. at 1914.

D. Decisions Below Concerning the Gun Lake Act

Because summary judgment briefing was underway in the District Court when the Gun Lake Act became law, the parties addressed its constitutionality in conjunction with other issues and arguments relevant to those motions.

Petitioner argued to the District Court that the Gun Lake Act is unconstitutional for several reasons—including that it violates separation of powers principles and the Fifth Amendment, as well as the First Amendment's right to petition, and the prohibition on bills of attainder. The District Court, however, rejected each of these arguments, and found that "the Gun Lake Act is constitutional" and that "the Act's plain language and legislative history manifest a clear intent to moot this litigation." JA 57, 59. Believing it "lack[ed] jurisdiction to reach the merits of plaintiff's claim," the District Court granted the Gun Lake Tribe's motion for summary judgment. JA 59, 71.

On appeal, the D.C. Circuit rejected all arguments that the Gun Lake Act is unconstitutional, and affirmed the District Court's disposal of the case because "if an action relates to the Bradley Property, it must promptly be dismissed." JA 34-35.

SUMMARY OF ARGUMENT

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 870 (1991). As James Madison explained to his colleagues during a debate in the First Congress: "[I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Congress 581 (1789).[6]

In the years since the Founding, "[o]ur national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

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[6] *See also* Gordon S. Wood, The Idea of America: Reflections on the Birth of the United States 180 (2011) ("As important as the idea of a written constitution distinguishable from ordinary statute law was in the eighteenth century, however, it was not the most significant constitutional deviation the Americans made from their inherited English traditions. More important in distinguishing American constitutionalism from that of the English . . . was the idea of separation of powers."); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 249 (1996) ("to affirm the principle of separated powers" was one of "two great lessons" drawn by those drafting the Constitution "[f]rom the memory of the wrongs inflicted by generations of royal governors and the belief that ambitious monarchs and their ministers regularly threatened liberty").

This case concerns the constitutionality of a statute through which Congress has intruded upon the judicial power.

Section 2(b) of the Gun Lake Act upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). It directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending any generally applicable statute. And it did so in order to overcome this Court's decision in *Patchak I*, and "void" Petitioner's lawsuit, H.R. Rep. No. 113-590, at 2, after this Court expressly held that it "may proceed." *Patchak I*, 567 U.S. 209, 212 (2012).

If Congress may direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.[7]

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[7] Respondents' briefs opposing the Petition for Certiorari defended the Gun Lake Act without identifying any limitation on the legislature's authority. *Cf. United States v. Alvarez*, 567 U.S. 709, 723 (2012) (rejecting purported governmental power with "no clear limiting principle"); *University of Penn. v. EEOC*, 493 U.S. 182, 194 (1990) (rejecting argument with "no limiting principle"); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982) ("The flaw in appellants' analysis is that it provides no limiting principle.").

The Gun Lake Act violates separation of powers principles—and the D.C. Circuit's decision to the contrary was incorrect.

ARGUMENT

I. The Gun Lake Act Is Unconstitutional

It is difficult to imagine a more direct invasion of the judicial power than occurred here: Congress, without amending underlying substantive or procedural laws, directed that any case relating to the parcel of property which was the subject of Petitioner's APA claim "shall be promptly dismissed," after this Court expressly held that his "suit may proceed." *Patchak I*, 567 U.S. at 212.

Although "it can sometimes be difficult to draw the line between legislative and judicial power," *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting), this is not such a case. And "the entire constitutional enterprise depends on there *being* such a line." *Id.*

A. Section 2(b) of the Gun Lake Act Impermissibly Mandated that Petitioner's Lawsuit Be "Promptly Dismissed" Without Amending Underlying Substantive or Procedural Laws

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. And they deliberatively and decisively "rejected th[e] practice [of colonial legislative review of judicial decisions] . . . because they believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and

controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment." *Id.* at 265-66 (Stevens, J., dissenting); *see also Marshall v. Gordon*, 243 U.S. 521, 534 (1917) ("Clear also is it . . . that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt . . . ."); *id.* at 535 (provisions in Maryland and Massachusetts constitutions "point[] to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons . . . ."); The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 182) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.").

Adhering to the Framers' intention and constitutional design, the Court has repeatedly confirmed that the judicial power cannot be shared with another branch of government. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982); *United States v. Nixon*, 418 U.S. 683, 704 (1974).

The Court also long ago recognized that "Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of

any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874); *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 413 (1792) (citing Letter from Iredell, J., and Sitgreaves, D.J., to President George Washington (June 8, 1792)) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested."); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of the Government."); The Federalist No. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A legislature, without exceeding its province, cannot reverse a determination once made in a particular case . . . .").

The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) ("the judicial function [is] deciding cases"); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . ."); *Marbury* v. *Madison*, 5 U.S. (1 Cranch)

137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Accordingly, one of the "basic constraints" on Congress imposed by the Constitution is that it may not "invest itself or its Members with either executive power or judicial power." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991); *Freytag*, 501 U.S. at 891 (finding Tax Court "exercises judicial power," noting "[i]ts decisions are not subject to review by either the Congress or the President").

These limitations are essential to protecting the independence of the judiciary. *See Miller v. French*, 530 U.S. 327, 350 (2000) ("[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design."); *Stern*, 564 U.S. at 482-83; *cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting) ("Judges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings."); *Williams v. United States*, 535 U.S. 911, 921 (2002) (Breyer, J., dissenting from denial of certiorari) (discussing the "special nature of the judicial enterprise" and the necessity for "freedom

from subservience to other Government authorities").[8]

Although this Court has not previously confronted an intrusion on the judicial power quite like that effected by Section 2(b) of the Gun Lake Act, the principles recognized and secured in the Court's prior decisions instruct that the Gun Lake Act invades and weakens the judicial power, and thereby violates the separation of powers.

For example, Section 2(b) of the Gun Lake Act is similar to a portion of the statute at issue in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where the Court held that Congress had "passed the limit which separates the legislative from the judicial power," when it "directed" that courts "shall forthwith dismiss" pending cases without altering applicable legal standards. *Klein*, 80 U.S. (13 Wall.) at 147; *see* Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

This case and *Klein* stand apart from those where the Court rejected separation of powers challenges to statutes which amended existing laws, and left the courts to apply new legal standards to the cases before them. *See, e.g., Bank Markazi*, 136 S.Ct. at 1323-24 (contrasting that case with *Klein*); *id.* at 1326 (no separation of powers violation because statute "changed the law by establishing new substantive standards, entrusting to the

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[8] *See also* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009) ("Court curbing in Congress may affect judicial decision making independent of any threat of enactment.").

District Court application of those standards to the facts (contested and uncontested) found by the court"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437 (1992) (no separation of powers violation because statute "replaced the legal standards . . . without directing particular applications under either the old or the new standards"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (addressing effect of change in underlying law by Congress).

While dissimilar to the statute actually at issue in *Bank Markazi*, the Gun Lake Act resembles the hypothetical statute discussed by Chief Justice Roberts in his *Bank Markazi* dissent, which directed that "Smith wins" his pending case, *Bank Markazi*, 136 S.Ct. at 1334-35 (Roberts, C.J., dissenting)—a statute which all members of the Court agreed "would be invalid." *Bank Markazi*, 136 S.Ct. at 1326 (noting potential constitutional infirmities, including Congress impermissibly compelling results "under old law" without "supply[ing] any new legal standard"). Indeed, Section 2(b) of the Gun Lake Act did precisely what this Court said had been impermissible in *Klein*: it "infringed the judicial power . . . because it attempted to direct the result without altering the [applicable] legal standards." *Id.* at 1324.

When Congress directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the

performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving v. United States*, 517 U.S. 748, 757 (1996).

B. Congress's Historical Practices Support the View that the Gun Lake Act Is Unconstitutional

The Gun Lake Act is unusual. This Court has not previously confronted an intrusion on the judicial power like that effected by Section 2(b) of the Gun Lake Act, which directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws.

That Congress has not previously enacted a statute with these characteristics—and only rarely enacted even a similar statute, *see Klein*, 80 U.S. (13 Wall.) 128—further supports the view that the Gun Lake Act is unconstitutional. *See Plaut*, 514 U.S. at 230 (Congress's "prolonged reticence would be amazing if such interference [with the judicial power] were not understood to be constitutionally proscribed."); *Printz v. United States*, 521 U.S. 898, 905 (1997) (from Congress's failure to employ "this highly attractive power, we would have reason to believe that the power was thought not to exist"); *see also Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'") (quoting *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2559 (2014)); *Luis v. United States*, 136 S.Ct. 1083, 1099 (2016) (Thomas, J., concurring) ("lack of

historical precedent" is indicative of a "constitutional problem"); *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts, C.J.) ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action.") (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

C. Section 2(b) of the Gun Lake Act Is Unconstitutional, Regardless of What Congress Intended to Accomplish in Section 2(a)

Section 2(a) of the Gun Lake Act provided that the Bradley Property "is reaffirmed as trust land," and "the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." The meaning and effect of this language is hardly self-evident. The Court of Appeals viewed Section 2(a) as having "changed the law," JA 34—although it did not explain how.

Petitioner believes Section 2(a) did not put the Bradley Property into trust. As the statute itself clearly states, it was enacted to "[t]o reaffirm that certain land *has been* taken into trust"—that is, it conveyed Congress's post-hoc endorsement of the Interior Secretary's decision (which the House Report described as "likely unlawful"[9]), seemingly without *itself* changing the legal status of the property. For that reason, both the House and Senate Reports concerning the Gun Lake Act stated

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[9] H.R. Rep. No. 113-590, at 2.

the statute would make no "changes in existing law." *See* H.R. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014); *see also* JA 34 (D.C. Circuit noting Section 2(a) ratified and confirmed "*the Department of the Interior's* decision to take the Bradley Property into trust") (emphasis added).

But even if the *intent* of Section 2(a) was to put the Bradley Property into trust, this would have led to numerous legal issues ***to be decided by the courts***—including (1) whether Section 2(a) actually did take the land into trust; and (2) if Section 2(a) did take the land into trust, how that impacted Petitioner's pending APA claim (including his entitlement to relief requested in his Complaint, such as a declaration that *the IRA* did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees—neither of which are obviously impacted by Section 2(a), regardless of how it is interpreted).

Among the issues confronting a court interpreting and applying Section 2(a) would have been any purported retroactive effect of Congress taking the Bradley Property into trust long after Petitioner filed his APA claim and subsequent to this Court's decision that his APA claim "may proceed." *See Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (requiring clear statement for retroactive civil legislation).

Yet the lower courts *could not* address any unresolved legal questions arising from Section 2(a) —including the meaning and effect of that provision,

and its potential retroactive application—because Congress precluded the Courts from deciding any of these when, in Section 2(b), it directed that Petitioner's pending case "shall be promptly dismissed." The D.C. Circuit—while mistaken about the constitutionality of the Gun Lake Act—made clear Section 2(b) was dictating the outcome of Petitioner's appeal, explaining: "if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action." JA 34-35.

Thus, the presence of Section 2(a) in the Gun Lake Act does not cure the profound separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced a host of *new*, unsettled legal issues pertinent to Petitioner's APA case. However, with Section 2(b), Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts. *Cf. Bank Markazi*, 136 S.Ct. at 1323 (expressing "no doubt" Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it."); *Klein*, 80 U.S. (13 Wall.) at 146-47 (explaining "we do not at all question what was decided in" *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), where "the court was left to apply its ordinary rules to the new circumstances created by the act"); *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 18 (certiorari stage) ("even assuming *arguendo* that section 2(a) *did* change substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow

that the change would be implemented by the *courts*").

Perhaps Section 2(a) would have aided the Secretary in defending against Petitioner's APA claim on the merits. But Congress decided Petitioner's case by itself when mandating that it be "promptly dismissed"—and in so doing exercised the judicial power reserved for the federal courts by Article III. *See Ex Parte Slater*, 246 U.S. 128, 133 (1918) ("exercise of the judicial function" is "applying recognized legal and equitable principles to the facts in hand"); *cf. Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1667 (2015) ("the role of judges differs from the role of politicians").

D. The Gun Lake Act Violates Separation of Powers Principles Regardless of Whether It Is Properly Characterized as a Jurisdictional Statute

The D.C. Circuit mistakenly viewed the Gun Lake Act as "removing *jurisdiction* from the federal courts over any actions relating to [the Bradley Property]." JA 25 (emphasis added). In opposing the Petition for Certiorari Respondents also relied heavily on their contention that the statute is jurisdictional. Although the statute violates separation of powers principles regardless of whether it is properly deemed jurisdictional, both the D.C. Circuit and Respondents are incorrect.

The Court has adopted a "bright line" test treating statutory limitations as nonjurisdictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *Arbaugh v. Y&H Corp.*, 546 U.S. 500,

515-16 (2006). This test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

The Gun Lake Act does not state (clearly or otherwise) that it is jurisdictional. To the contrary, the word "jurisdiction" does not appear anywhere in its title, headings or text. *Cf. Stern*, 564 U.S. at 480 ("we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such").

And the Gun Lake Act's legislative history corroborates that the statute is not jurisdictional. The House and Senate Reports each state the statute would not make any "changes in existing law." H.R. Rep. No. 113-590, at 5; S. Rep. No. 113-194, at 4.[10] The sections of the U.S. Code conferring subject matter jurisdiction over Petitioner's case were unaltered by the Gun Lake Act. *Cf. Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (subject matter jurisdiction concerns "the court's authority to hear a given *type* of case") (emphasis added).

But Respondents' argument about jurisdiction made in opposition to the Petition for Certiorari failed to address a more fundamental point: Section

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[10] After noting the Gun Lake Act would "void" Petitioner's lawsuit, the House Report referred to it as "an unusually broad grant of immunity from lawsuits pertaining to the Bradley property"—without any mention of jurisdiction. H.R. Rep. No. 113-590, at 2.

2(b) of the Gun Lake Act would violate the separation of powers *even if* the statute were ostensibly "jurisdictional."

Congress's broad authority to define the jurisdiction of the federal courts must be exercised consistent with all of the Constitution's requirements—including its separation of powers principles. *See City of Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013) ("Congress has the power *(within limits)* to tell the courts what *classes* of cases they may decide.") (emphasis added); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 125 (1981) (Brennan, J., concurring) ("Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress."); *United States v. Bitty*, 208 U.S. 393, 399-400 (1908) (explaining Congress may determine the Court's jurisdiction "having of course due regard to all the provisions of the Constitution"); *see also Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (statute denying federal courts jurisdiction to hear certain habeas corpus actions pending at the time of the statute's enactment effected an unconstitutional suspension of the writ of habeas corpus).

Respondents failed to identify any decision from this Court holding that Congress's general power to alter the jurisdiction of the federal courts precludes finding a particular jurisdiction-stripping statute violates separation of powers principles.

Moreover, *Klein*, 80 U.S. (13 Wall.) 128, would directly refute any such claim. There, the Court held that Congress had invaded the judicial power with a statute providing the Court "shall have no further jurisdiction of the cause, and shall dismiss the same

for want of jurisdiction." *Id.* at 143. As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.

Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction does not permit it to exercise judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities.[11]

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[11] Respondents claim the Gun Lake Act's "purpose" was to "provide certainty to the legal status of the [Bradley Property]," with Federal Respondents insisting that "[e]conomic certainty and the finality of governmental decisions are legitimate governmental purposes." Brief for the Federal Respondents in Opposition to the Petition 17; Intervenor-Respondent Tribe's Opposition to the Petition 6. While the Gun Lake Act certainly sought to settle "the legal status" of the property, its purpose was also to overcome "a U.S. Supreme Court opinion [*Patchak I*] that ha[d] allowed one individual to challenge the authority of the Secretary of Interior to take land into trust," and to "end" Petitioner's lawsuit. *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509, at 55 (2014) (statement of David K. Sprague); *see also id.* at 9 (legislation was "to address *Patchak [I].*") (statement of Kevin Washburn); JA 59 (district court finding Congress had "a clear intent to moot this litigation"). The Gun Lake Act provided "certainty" only by "extinguish[ing] all rights to legal actions relating to the trust lands," S. Rep. No. 113-194, at 3, and "void[ing]" Petitioner's lawsuit. H.R. Rep. No. 113-590, at 2.

E. Petitioner Has Been Deprived of Individual Rights Which Structural Separation of Powers Principles Are Designed to Safeguard

"The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). Having experienced and rejected a system of intermingled legislative and judicial powers, *Plaut*, 514 U.S. at 219, the Framers recognized—as has this Court—that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.' [But] liberty . . . would have everything to fear from its union with either of the other departments." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 181); *see also Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (it is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty'") (quoting *Bond*, 564 U.S. at 223). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

The threat to individual rights is particularly acute when the political branches intrude upon the judicial power. Separation of the judiciary was "to guarantee that the process of adjudication itself remained impartial," *Northern Pipeline*, 458 U.S. at 58, and Article III safeguards litigants' "right to have claims decided by judges who are free from

potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (Article III, Section 1's "guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal" interests); *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1219 (2015) (Thomas, J., concurring) ("The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law."); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 91 (1868) ("[T]o adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.").

The aspiration to secure a separate, independent judiciary was among the grounds for declaring independence from Great Britain. *See* The Declaration of Independence ¶¶ 10, 11 (1776); *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) ("The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department . . . was foreshadowed, and its vital character attested, by the Declaration of Independence . . . .").

Here, with Section 2(b)'s mandate that Petitioner's pending case be "promptly dismissed," Congress arrogated to itself the judicial role of deciding Petitioner's APA claim—and did so after this Court had already determined that his "suit may proceed." In so doing, Congress's separation of powers violation stripped Petitioner of his individual right to have his claim adjudicated by a neutral judge, free of political interference.

II. The Court Must Guard Against Separation of Powers Violations

"Time and again" this Court has "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington*, 133 S.Ct. at 1886 (Roberts, C.J., dissenting).[12] "[The

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[12] This Court's decisions are frequently shaped by a commitment to avoid encroaching on the powers assigned to the legislative and executive branches. *See, e.g., SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 960 (2017) ("applying laches within a limitations period

Court] may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring). "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring)).

While the adverse impact of the Gun Lake Act on Petitioner may not itself rise to the level of national significance, "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the

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specified by Congress would give judges a 'legislation-overseeing' role that is beyond the Judiciary's power"); *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) ("In order to remain faithful to th[e] tripartite structure [of the federal government], the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches."); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503. "The next time Congress takes judicial power from Article III courts, the encroachments may not be so modest . . . ." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting).

CONCLUSION

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983). With the Gun Lake Act, Congress has "passed the limit which separates the legislative from the judicial power," but "[i]t is of vital importance that these powers be kept distinct." *Klein*, 80 U.S. (13 Wall.) at 147.

The Court should hold that the Gun Lake Act is unconstitutional, and the judgment of the D.C. Circuit should be reversed and the case remanded for further proceedings.

July 2017

Respectfully submitted,

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RECORD AND BRIEFS

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No. 16-498

In the Supreme Court of the United States

DAVID PATCHAK, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

The Secretary of the Interior (Secretary) took a parcel of land into trust for an Indian tribe, and petitioner challenged that decision under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* While his suit was pending in the district court, Congress enacted legislation that reaffirmed the trust status of the land, ratified and confirmed the Secretary's decision to take the land into trust, and provided that "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land [at issue in this case] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913. The district court dismissed petitioner's suit, and the court of appeals affirmed. The question presented is:

Whether Congress may prohibit actions related to this particular parcel of land from being filed or maintained in the federal courts, and order that pending cases meeting that standard be dismissed, without intruding on the role of the judiciary under constitutional separation-of-powers principles.

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In the Supreme Court of the United States

No. 16-498

DAVID PATCHAK, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 24-45) is reported at 828 F.3d 995. The opinion of the district court (J.A. 50-71) is reported at 109 F. Supp. 3d 152.

JURISDICTION

The judgment of the court of appeals (J.A. 46-47) was entered on July 15, 2016. The petition for a writ of certiorari was filed on October 11, 2016, and was granted on May 1, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-3a.

STATEMENT

1. The Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*,[1] was enacted to enable Indian tribes "to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). In furtherance of that statutory purpose, Section 5 of the IRA authorizes the Secretary of the Interior (Secretary) to acquire lands in the name of the United States and hold those lands in trust for an Indian tribe or individual Indian. 25 U.S.C. 5108. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, known as the Gun Lake Tribe (the Tribe), is a federally-recognized Indian tribe residing in southwestern Michigan. See 63 Fed. Reg. 56,936 (Oct. 23, 1998). In 2005, in response to an application from the Tribe, the Department of the Interior announced that it would take into trust for the Tribe a 147-acre parcel of land (the Bradley Property) in the township of Wayland, Michigan. See 70 Fed. Reg. 25,596 (May 13, 2005); see also J.A. 26. The Tribe intended to use the land for gaming in compliance with the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, and it built a casino there, which has been in operation since 2011. J.A. 26.

2. In 2008, petitioner, a non-Indian who lives near the Bradley Property, filed suit in federal district court to challenge the Secretary's land-into-trust decision under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* J.A. 27. The United States had taken title to the land in 2009, J.A. 54-55, after the conclusion of an earlier suit, filed in 2005 by a different plaintiff, which unsuccessfully challenged the Secretary's authority to

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[1] In 2016, Title 25 of the United States Code was reclassified, and the provisions of the IRA were renumbered.

take the land into trust, see *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 26-28, 30-33 (D.C. Cir. 2008) (per curiam), cert. denied, 555 U.S. 1137 (2009). Shortly after the United States took title to the Bradley Property, this Court held in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), that Section 5 of the IRA, 25 U.S.C. 5108, authorizes the Secretary to take land into trust for an Indian tribe under the first definition of "Indian" in the IRA, see 25 U.S.C. 5129 ("members of any recognized Indian tribe now under Federal jurisdiction"), only if the tribe was "under Federal jurisdiction" when the IRA was enacted in 1934. 555 U.S. at 382 (citation omitted). Petitioner alleged that the Secretary's decision to take the Bradley Property into trust exceeded the authority provided by Congress because, in petitioner's view, the Tribe was not under federal jurisdiction in 1934. J.A. 55. Petitioner alleged injuries from expected increases in traffic and property taxes, as well as "an irreversible change in the rural character of the area" and a "weakening of the family atmosphere of the community." 646 F. Supp. 2d at 75 n.5; see J.A. 27.[2]

3. a. The district court held that petitioner's alleged injuries were not within the zone of interests protected by Section 5 of the IRA and dismissed petitioner's suit for lack of prudential standing. 646 F. Supp. 2d at 76-79. The court also expressed reservations about its jurisdiction over the case given that the Secretary had already taken the land into trust. *Id.* at 78 n.12. The court noted that the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. 2409a, which applies to suits to adjudicate disputed title to real property in which the United States claims an interest, expressly does not

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[2] Petitioner's complaint did not raise any constitutional challenges to the Secretary's decision to take the land into trust. J.A. 27.

waive the United States' sovereign immunity for suits disputing the United States' title to trust or restricted Indian lands. 646 F. Supp. 2d at 78 n.12; see 28 U.S.C. 2409a(a). Having dismissed petitioner's suit for lack of standing, however, the court declined to rule on that issue. 646 F. Supp. 2d at 79 n.12.

b. The court of appeals reversed. 632 F.3d at 712. The court concluded that petitioner had standing to challenge the Secretary's decision, *id.* at 704-707, and it rejected the Secretary's and the Tribe's alternative argument that sovereign immunity barred the suit by virtue of the Quiet Title Act, *id.* at 707-712.

c. This Court affirmed the court of appeals' decision. 567 U.S. at 212, 228 (*Patchak I*). The Court held that the federal government was not immune from the suit by virtue of the Quiet Title Act. *Id.* at 215-224. The Court explained that the APA generally waives the federal government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *Id.* at 215 (quoting 5 U.S.C. 702).

The APA's waiver of sovereign immunity, the Court noted, "comes with an important carve-out"—it does not apply "'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." 567 U.S. at 215 (quoting 5 U.S.C. 702). But the Court held that the Quiet Title Act is not such a statute. *Id.* at 215-224. The Court explained that the Quiet Title Act waives the government's sovereign immunity from "a suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Id.* at 215 (quoting 28 U.S.C. 2409a(d)). Because petitioner

did not claim any right, title, or interest of his own in the Bradley Property, the Court concluded that his suit was not a quiet-title action, and the Quiet Title Act's exception to the waiver of sovereign immunity for actions to quiet title to "trust or restricted Indian lands," 28 U.S.C. 2409a(a), therefore did not bar petitioner's suit under the APA. 567 U.S. at 215-221. The Court concluded that petitioner's challenge to the Secretary's authority to take the Bradley Property into trust is "a garden-variety APA claim" subject to that statute's waiver of sovereign immunity. *Id.* at 220.

The Court acknowledged the concern of the federal government and the Tribe that allowing suits such as petitioner's to proceed would pose significant barriers to Indian tribes' ability to promote investment and economic development on lands taken into trust by the Secretary. 567 U.S. at 223. The Court stated that that argument was "not without force, but it must be addressed to Congress." *Ibid.* The Court explained that in the Quiet Title Act, "Congress made a judgment about how far to allow quiet title suits" and chose not to waive sovereign immunity for actions seeking to quiet title to trust or restricted Indian lands. *Ibid.* The Court observed that "[p]erhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land," such as petitioner's suit challenging the legality of the Secretary's decision to take the land into trust for the Tribe. *Id.* at 224. That decision, the Court concluded, belongs to Congress. *Ibid.*

The Court further held that the interests asserted by petitioner were arguably within the zone of interests protected by Section 5 of the IRA and that he therefore had prudential standing under the APA to challenge the

Secretary's land-into-trust decision. 567 U.S. at 224-228. Because he had standing, and because Congress had waived the United States' sovereign immunity for petitioner's APA claim, this Court held that petitioner's "suit may proceed," *id.* at 212, and it remanded for further proceedings, *id.* at 228.

4. Following the remand, petitioner waited for more than two years before proceeding in the district court. J.A. 18. During that time, Congress held hearings on the economic uncertainty that this time-consuming litigation imposed on the Tribe,[3] and in 2014 it enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. No. 113-179, 128 Stat. 1913. In relevant part, the Gun Lake Act provides:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

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[3] See *S. 1603, S. 1818, S. 2040, S. 2041, and S. 2188: Hearing Before the Senate Comm. on Indian Affairs*, 113th Cong., 2d Sess. (2014); 160 Cong. Rec. H7485 (daily ed. Sept. 15, 2014) (House consideration of bill); 160 Cong. Rec. H7577-H7578 (daily ed. Sept. 16, 2014) (House consideration and passage of bill).

§ 2, 128 Stat. 1913.

When Congress was considering the Gun Lake Act, it was uncertain whether the Tribe was "under federal jurisdiction" when the IRA was enacted in 1934, and thus whether the Secretary was authorized, under the Court's interpretation of the IRA in *Carcieri*, to take land into trust for the Tribe. H.R. Rep. No. 590, 113th Cong., 2d Sess. 2 (2014) (House Report). And more broadly, the House Report explained that there was "no consensus in Congress on how to address" *Carcieri*, and that in the meantime, "consideration of bills to take specific lands in trust * * * is the appropriate means of resolving trust land matters." *Id.* at 2-3. With respect to the Bradley Property, the House Report expressed concern that without the legislation, "the continued operation of the Gun Lake Tribe casino will be placed in jeopardy." *Id.* at 1. The Senate Report similarly explained that the Gun Lake Act would "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 194, 113th Cong., 2d Sess. 2 (2014) (Senate Report). Congress therefore acted to eliminate any doubt as to the legality of the Secretary's decision or the trust status of the Bradley Property by "reaffirm[ing]" the trust status of the land and by "ratif[ying] and confirm[ing]" the actions of the Secretary. Gun Lake Act § 2(a), 128 Stat. 1913.[4]

Having eliminated any doubt about the trust status of the land, Congress further provided in the Gun Lake

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[4] The Secretary also issued a contemporaneous decision evaluating the historical evidence and concluding that the Tribe was "under federal jurisdiction" in 1934. J.A. 75-159. The Secretary therefore concluded that Section 5 of the IRA authorized the Secretary to take land into trust for the Tribe. J.A. 142-147.

Act that any action relating to the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b), 128 Stat. 1913.

5. Following enactment of the Gun Lake Act, the district court dismissed petitioner's suit. J.A. 50-71. The court explained that the "clear intent" of Congress was "to moot this litigation" and that, barring some constitutional infirmity in the Gun Lake Act itself, the court lacked jurisdiction over the case. J.A. 59.

a. The district court rejected petitioner's argument that Section 2(b) of the Gun Lake Act violated separation-of-powers principles under Article III of the Constitution. J.A. 60-65. The court acknowledged that in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court declined to give effect to a statute that "prescribe[d] [a] rule[] of decision" to the judiciary in a pending case. J.A. 61 (first set of brackets in original) (quoting *Klein*, 80 U.S. (13 Wall.) at 146). The district court explained, however, that this Court's subsequent cases "have clarified that the Constitution is not offended when Congress amends substantive federal law, even if doing so affects pending litigation." J.A. 61-62 (citing *Miller* v. *French*, 530 U.S. 327, 348-350 (2000); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). "[F]ederal statutes do not run afoul of *Klein*," the district court explained, "as long as they refrain from 'direct[ing] any particular findings of fact or applications of law, old or new, to fact.'" J.A. 62 (second set of brackets in original) (quoting *Robertson*, 503 U.S. at 438).

The district court concluded that Section 2(b) of the Gun Lake Act did not violate separation-of-powers principles under this Court's cases. J.A. 62-63. The district

court explained that the Gun Lake Act "does not mandate a particular finding of fact or application of law to fact," but instead "withdraws this Court's jurisdiction to make any substantive findings whatsoever." J.A. 63. "This," the district court concluded, "Congress most assuredly can do." *Ibid.*

b. The district court further rejected petitioner's contention that Section 2(a) of the Gun Lake Act, which "reaffirmed" the Bradley Property as trust land and "ratified and confirmed" the Secretary's action taking that land into trust, violates separation-of-powers principles by superimposing Congress's own interpretation of the IRA without amending the statute. 128 Stat. 1913; see J.A. 64-65. The court explained that Section 2(a) did not instruct any court to ratify the Secretary's action or compel any findings of fact or applications of law. J.A. 65. Although "Congress lent its imprimatur to the Secretary's decision," it "stopped short of requiring the judiciary to do the same." *Ibid.*[5]

6. The court of appeals affirmed, J.A. 24-45, holding that Section 2(b) of the Gun Lake Act did not encroach upon the judicial power in violation of separation-of-powers principles, J.A. 31-35. The court rejected petitioner's argument that Congress may only affect the outcome of pending litigation by "directly amend[ing]

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[5] Petitioner raised a number of additional constitutional challenges to the Gun Lake Act, all of which the district court rejected. J.A. 66-71 (rejecting petitioner's arguments that Section 2(b) of the Act (i) burdens his First Amendment right to petition the government, (ii) violates his Fifth Amendment due process rights; and (iii) constitutes an unlawful bill of attainder that sought to punish petitioner individually in violation of Article I, Section 9 of the Constitution). The court of appeals affirmed the district court's rulings on those issues, J.A. 35-43, and petitioner has not renewed them in this Court.

the substantive laws upon which the suit is based." J.A. 32. The court observed that this Court has rejected constitutional challenges to new legislation that "compelled changes in law" without directly amending the underlying statute. J.A. 33 (quoting *Robertson*, 503 U.S. at 438); see J.A. 32-34 (citing *Robertson*, 503 U.S. at 436-437, 440, and *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318, 1325-1326 (2016)). Here, the court of appeals continued, "[t]hrough its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has 'changed the law.'" J.A. 34 (quoting *Bank Markazi*, 136 S. Ct. at 1326). The court further explained that, "[m]ore to the point, Section 2(b) provides a new legal standard [the court is] obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed." J.A. 34-35. The court concluded that "subject matter jurisdiction over [petitioner's] claim has thus validly been withdrawn." J.A. 43.

The court of appeals noted that the government had advanced an alternative ground on which the court could rule—that the Gun Lake Act "provides an exemption to the APA's waiver of sovereign immunity." J.A. 43. Because the court concluded that the Gun Lake Act validly withdrew subject-matter jurisdiction over petitioner's claim, the court declined to consider that alternative grounds for affirmance. *Ibid.*

SUMMARY OF ARGUMENT

A. Under Article III of the Constitution, Congress has the power to ordain and establish inferior federal courts and to define the jurisdiction of those courts.

That power includes the authority to withdraw jurisdiction previously given and to subject pending cases to the new jurisdictional limitation. If jurisdiction is withdrawn without a savings clause, all pending cases must fall. Section 2(b) of the Gun Lake Act, which provides that any action relating to the Bradley Property, including a pending action, "shall not be filed or maintained in a Federal court and shall be promptly dismissed," 128 Stat. 1913, eliminates the competence of federal courts to adjudicate a particular category of cases and thereby limits the subject-matter jurisdiction of the federal courts. This Court has stated that Congress need not use "magic words" to clearly state a jurisdictional rule, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013), and the Court has previously concluded that statutory provisions similar to Section 2(b) of the Gun Lake Act stated a jurisdictional limitation. When Congress provides that an action "shall not be filed or maintained in a Federal court," it is not defining the ingredients of a claim for relief or establishing a claims-processing rule. Rather, Section 2(b) is a flat prohibition on filing or maintaining any action relating to the Bradley Property in the federal courts.

B. Similarly, Section 2(b) of the Gun Lake Act precludes judicial review of petitioner's APA claim because the statute restores sovereign immunity previously waived by Congress in the APA for actions relating to the Bradley Property. The United States, having given its consent in the APA for agency officials to be sued, may withdraw that consent at any time, and it has done so for actions relating to the Bradley Property. Congress has specified in the APA itself that its provisions for judicial review do not apply where other statutes "preclude judicial review," 5 U.S.C. 701(a)(1), and that

the APA's waiver of sovereign immunity does not "affect[] other limitations on judicial review," 5 U.S.C. 702. The result is that cases relating to the Bradley Property, including petitioner's APA suit, must be dismissed.

C. Section 2(b) of the Gun Lake Act does not offend any separation-of-powers principle recognized by this Court. It is well-established that Congress may enact a statute that changes the law applicable to pending cases. This Court has routinely applied changes in the governing law to pending cases, and that principle applies equally to cases withdrawing the jurisdiction of the federal courts over certain cases or restoring the United States' sovereign immunity with respect to those cases. The Court held in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), that Congress cannot require courts to apply a new law predicated on a determination that Congress is powerless to make. *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1324 (2016). But Section 2(b) of the Gun Lake Act does not do that. It creates a new law for the courts to apply: an action that relates to the Bradley Property may not be filed or maintained in federal court. And that change in the law falls squarely within Congress's authority to withdraw its grant of jurisdiction to the federal courts and to withdraw its waiver of the sovereign immunity of the United States in those courts. Nor does the requirement that an action relating to the Bradley Property "shall be promptly dismissed" leave the courts without any adjudicatory function to perform. Gun Lake Act § 2(b), 128 Stat. 1913. Dismissal is the natural and mandatory consequence of the courts' determination that the action relates to the Bradley Property and thus cannot be maintained in federal court.

This Court's conclusion in *Patchak I*—that petitioner's suit "may proceed"—was made in the context of the Court's conclusion that petitioner had prudential standing and that Congress at that time had waived the United States' immunity from petitioner's suit under the APA. 567 U.S. at 212. That conclusion does not entitle petitioner to litigate the merits of his APA challenge now. Congress's subsequent enactment of the Gun Lake Act amended the law applicable to petitioner's claim by eliminating federal-court jurisdiction over a category of cases that includes petitioner's suit and by withdrawing the United States' waiver of sovereign immunity for that category of cases.

ARGUMENT

SECTION 2(b) OF THE GUN LAKE ACT IS A VALID EXERCISE OF CONGRESS'S AUTHORITY TO DEFINE THE JURISDICTION OF THE FEDERAL COURTS AND TO RESTORE THE SOVEREIGN IMMUNITY OF THE UNITED STATES

The Gun Lake Act was enacted by Congress to resolve a long-running dispute regarding the decision of the Secretary to take the Bradley Property into trust for the Tribe. The Act was intended to eliminate any doubt regarding the trust status of the land, on which the Tribe has operated a casino since 2011, J.A. 26, and to free that land from pending or future litigation that could continue or reignite that uncertainty. The Gun Lake Act contains two operative provisions to accomplish those ends.

The first provision, Section 2(a), is not directly at issue here. Section 2(a) of the Act "reaffirm[s]" that the Bradley Property is trust land and states that the actions of the Secretary in taking the land into trust "are

ratified and confirmed." 128 Stat. 1913. Under the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and other provisions of the Constitution, Congress has "plenary power to legislate in the field of Indian affairs." *United States* v. *Lara*, 541 U.S. 193, 200 (2004) (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). Although Congress has vested authority in the Secretary to take land into trust under the IRA, "the primary responsibility for choosing land to be taken in trust still lies with Congress." *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).

To the extent there was uncertainty about the Secretary's authority to take the property into trust, Congress could ratify the Secretary's action and establish the land's trust status even if the Secretary's prior action was unauthorized. "It is well settled that Congress may * * * ratify . . . acts which it might have authorized, and give the force of law to official action unauthorized when taken." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301-302 (1937) (internal citation and internal quotation marks omitted); see *United States* v. *Heinszen & Co.*, 206 U.S. 370, 382 (1907) ("That where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity * * * , is so elementary as to need but statement."). And "irrespective of any doctrine of ratification," Congress may establish retroactively by legislation that an action of a governmental official is "confirmed and approved" to be within that official's powers. *Swayne & Hoyt*, 300 U.S. at 302. The

Gun Lake Act both "ratified and confirmed" the Secretary's decision, and thereby established that the Secretary's action was authorized and the Bradley Property is properly held in trust. § 2(a), 128 Stat. 1913. Petitioner briefly asserts (Br. 19) that Section 2(a) of the Gun Lake Act did not actually place the Bradley Property into trust. But he does not ask this Court to interpret that provision.

The second provision is directly at issue here. Section 2(b) of the Gun Lake Act further protects the Bradley Property from present and future uncertainty by eliminating the threat of present and future litigation relating to the property, which had been the source of the uncertainty for a number of years. Section 2(b) prohibits any action relating to the Bradley Property from being filed or maintained in federal court. 128 Stat. 1913. That provision was well within Congress's power to enact, both as an exercise of Congress's authority to define the jurisdiction of the federal courts and as an exercise of its authority to provide for the sovereign immunity of the federal government from suit. And in enacting Section 2(b), Congress did not violate any separation-of-powers principle recognized by this Court. It acted permissibly to change the law applicable to pending cases rather than attempting to direct the result in petitioner's case under existing law.

A. Section 2(b) Eliminates The Jurisdiction Of The Federal Courts To Hear Any Action Relating To The Bradley Property

1. Congress can withdraw jurisdiction over pending suits

Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in

one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. Included in Congress's broader power to ordain and establish inferior federal courts is the power "to define and limit the jurisdiction of" those courts. *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938). As this Court long ago explained, the "Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it." *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Only the jurisdiction of this Court "is derived directly from the Constitution," *ibid.*, and its appellate jurisdiction is conferred "with such Exceptions, and under such Regulations as the Congress shall make," U.S. Const. Art. III, § 2, Cl. 2.

The power of Congress to define and limit the jurisdiction of the inferior federal courts includes the authority to withdraw jurisdiction previously given and to subject pending cases to the new jurisdictional limitation. As the Court has explained, jurisdiction that has been conferred "may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234. This Court has repeatedly applied that basic principle. See, *e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the rule that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) ("Jurisdiction * * * was conferred by an

act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.").[6]

In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), for example, a federal district court denied a petition for a writ of habeas corpus under a statute granting federal courts jurisdiction over such petitions, and the prisoner appealed to this Court pursuant to a statutory grant of appellate jurisdiction. See *id.* at 515. Congress, however, repealed the appellate-jurisdiction provision before the Court issued a decision. *Id.* at 512-514. The Court held that Congress had acted within its power under Article III, which expressly includes "the power to make exceptions to the appellate jurisdiction of this [C]ourt." *Id.* at 514. The Court stated that when its jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ibid.*

Similarly, in *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541 (1867), an insurance company incorporated in Massachusetts brought suit in federal court against Massachusetts tax collectors under a statute that granted federal courts jurisdiction over suits between citizens of the same State "for causes arising under the revenue

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[6] In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), the Court held that although the withdrawal of jurisdiction in the Detainee Treatment Act of 2005, Pub. L. No. 109-145, Div. A, Tit. X, 119 Stat. 2739, did not contain a savings clause, there were nonetheless sufficient indications of congressional intent not to withdraw jurisdiction over pending cases. 548 U.S. at 572-584. There are no such indications here, and indeed Section 2(b) of the Gun Lake Act expressly applies to pending cases.

laws." *Id.* at 543; see *id.* at 542. While the suit was pending, Congress repealed the jurisdictional provision without any clause that would save pending cases. *Id.* at 543. "It is clear," the Court explained, "that when the jurisdiction of a cause depends upon a statute[,] the repeal of the statute takes away the jurisdiction," and the Court therefore dismissed the case for lack of jurisdiction. *Id.* at 544; see *id.* at 545.

2. Section 2(b) withdraws jurisdiction over pending suits relating to the Bradley Property

a. Section 2(b) of the Gun Lake Act similarly withdraws the jurisdiction of the federal courts, and its application to this case pending at the time of its enactment is constitutional under this Court's longstanding precedent. Congress's withdrawal of federal-court jurisdiction to review actions relating to the Bradley Property falls squarely within Congress's recognized authority to "give, withhold or restrict [federal-court] jurisdiction at its discretion." *Kline*, 260 U.S. at 234.

It makes no difference to the validity of Section 2(b) of the Gun Lake Act that Congress withdrew jurisdiction over a pending case, thereby requiring the dismissal of petitioner's suit after this Court concluded in *Patchak I* that the "suit may proceed" under the jurisdictional regime and waiver of the United States' sovereign immunity as they existed at the time. 567 U.S. at 212. When jurisdiction previously conferred is withdrawn without saving pending cases, "all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234. Here, while petitioner's APA claim was pending before the district court on remand from this Court, and before entry of any final judgment on the merits of petitioner's claim, Congress eliminated the ju-

risdiction of the federal courts to hear any action relating to the Bradley Property. And it provided that an action relating to the Bradley Property—expressly including any then-"pending" actions—"shall not be filed *or maintained*" in federal court, and any such actions "shall be promptly dismissed." Gun Lake Act § 2(b), 128 Stat. 1913 (emphasis added). Section 2(b) of the Gun Lake Act thus is a valid exercise of Congress's power to define and limit the jurisdiction of the federal courts.

b. Petitioner contends (Br. 23) that Section 2(b) of the Gun Lake Act does not limit the jurisdiction of federal courts because it "does not state (clearly or otherwise) that it is jurisdictional." Petitioner's argument rests (*ibid.*) on the observation that "the word 'jurisdiction' does not appear anywhere in [the Gun Lake Act's] title, headings or text." That argument should be rejected.

i. Subject-matter jurisdiction describes "a court's competence to adjudicate a particular category of cases." *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 316 (2006). Section 2(b) of the Gun Lake Act provides that any action relating to the Bradley Property, expressly including an action pending as of the date of enactment, "shall not be filed or maintained in a Federal court and shall be promptly dismissed." 128 Stat. 1913. The statute thus eliminates the "competence [of federal courts] to adjudicate a particular category of cases," *i.e.*, cases relating to the Bradley Property, and thereby limits the subject-matter jurisdiction of the federal courts. *Wachovia Bank*, 546 U.S. at 316.

Congress need not "incant magic words" in order to have clearly stated that a rule is jurisdictional. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). In

assessing whether a statutory provision is jurisdictional, this Court considers "context, including this Court's interpretation of similar provisions in many years past." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010); see *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153-154. This Court has previously concluded that a provision worded similarly to Section 2(b) of the Gun Lake Act stated a jurisdictional limitation. In *Keene Corp.* v. *United States*, 508 U.S. 200 (1993), the Court considered language in 28 U.S.C. 1500, which provides that the Court of Federal Claims "shall not have jurisdiction" over a claim for which the plaintiff has a suit pending in another court. *Ibid.*; see 508 U.S. at 202. The immediate predecessor to Section 1500 contained language similar to Section 2(b) of the Gun Lake Act. It provided that "[n]o person shall file or prosecute in the Court of Claims" any claim for which he has a suit pending in another court. Judicial Code, ch. 231, § 154, 36 Stat. 1138; see *Keene Corp.*, 508 U.S. at 208. The Court concluded that the revision was a "change 'in phraseology'" that did not "work[] a change in the underlying substantive law," and that both versions of the statute "bar jurisdiction over the claim of a plaintiff who, upon filing, has an action pending in any other court" for the same claim. *Keene Corp.*, 508 U.S. at 209 (citation omitted).

If legislation providing that "[n]o person shall file or prosecute" a claim in federal court in particular circumstances is synonymous with legislation providing that courts "shall not have jurisdiction" over such a claim, as this Court held in *Keene Corp.*, then so too is the Gun Lake Act's direction that claims relating to the Bradley Property "shall not be filed or maintained" in federal court.

Similarly, in *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012), the Court stated that the statutory directive that "an appeal may not be taken to the court of appeals" without a certificate of appealability, 28 U.S.C. 2253(c)(1), is "clear jurisdictional language" establishing that federal appellate courts "lack jurisdiction to rule on the merits of appeals from habeas petitioners" until a certificate has been issued. 565 U.S. at 142 (citation and internal quotation marks omitted). That "clear[ly] jurisdictional language," *i.e.*, that "an appeal may not be taken," is the appellate-court equivalent of the language in Section 2(b) of the Gun Lake Act providing that actions relating to the Bradley Property "shall not be filed or maintained" in federal court, 128 Stat. 1913.

ii. The cases on which petitioner relies discuss statutory provisions unlike Section 2(b) of the Gun Lake Act and do not support petitioner's contention that Congress was required to use the term "jurisdiction" in order to redefine and limit the jurisdiction of the federal courts. See Pet. Br. 22-23 (citing *Auburn Reg'l Med. Ctr.*, 568 U.S. at 153, and *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006)).

In *Arbaugh*, the Court addressed "two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." 546 U.S. at 503. In defining what type of "employer" could be sued for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress limited the definition to include only those employers with "fifteen or more employees." *Arbaugh*, 546 U.S. at 503 (quoting 42 U.S.C. 2000e(b)). The Court held that a plaintiff must establish that the defendant had 15 employees as a necessary factual prerequisite to stating a

claim, but the requirement was not "jurisdictional." *Id.* at 513-516.

The Court reasoned that courts have "an independent obligation to determine whether subject-matter jurisdiction exists," but "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met." *Arbaugh*, 546 U.S. at 514. The Court further reasoned that although Congress could have made the 15-employee requirement jurisdictional, just as it has made an amount-in-controversy a threshold requirement of diversity jurisdiction under 28 U.S.C. 1332, the 15-employee threshold "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh*, 546 U.S. at 515 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)); see *id.* at 514-515.

In contrast to the Title VII provision in *Arbaugh*, Section 2(b) of the Gun Lake Act does not establish any factual prerequisites or legal requirements for stating a claim challenging the Secretary's decision to take land into trust for an Indian tribe (or for any other claim). Instead, it precludes all actions in federal court relating to the Bradley Property entirely and requires that any pending actions be dismissed. Gun Lake Act § 2(b), 128 Stat. 1913. If Congress had instead stated that "the federal courts shall not have jurisdiction over any action relating to" the Bradley Property, the consequences for petitioner's suit would be identical to those under Section 2(b) as written.

Auburn Regional Medical Center, the other case on which petitioner relies (Br. 32), also addressed a statutory requirement not analogous to Section 2(b). In that case, the Court considered whether a statutory 180-day

time limit for filing administrative appeals challenging certain Medicare reimbursement decisions was "jurisdictional," and held that it was not. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 149. The provision allowed the agency to grant an extension of time upon a showing of good cause, and did not contain mandatory terminology, providing only that parties complying with the 180-day time limit "may obtain a hearing." *Id.* at 154 (quoting 42 U.S.C. 1395*oo*(a)(3)). "Key" to the Court's decision was a long line of cases holding that "filing deadlines ordinarily are not jurisdictional" but rather are "quintessential claim-processing rules." *Ibid.* (citation omitted).

Section 2(b) of the Gun Lake Act contains none of those features. It applies to federal courts, not an administrative agency; it is mandatory (suits "*shall* not be filed or maintained"); it contains no exceptions of any kind; and it is not a time limit or other claims-processing rule. 128 Stat. 1913 (emphasis added); see *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) (claims-processing rules are rules that require the parties to "take certain procedural steps at certain specified times"). Section 2(b) is an all-encompassing prohibition on filing or maintaining any action relating to the Bradley Property in federal court. The provision falls squarely within this Court's precedent acknowledging Congress's authority to define the jurisdiction of the inferior federal courts.

B. Section 2(b) Withdraws The United States' General Waiver Of Sovereign Immunity In The Administrative Procedure Act For Any Action Relating To The Bradley Property

Even if petitioner were correct that Section 2(b) of the Gun Lake Act is not a jurisdictional provision, the provision still precludes judicial review of petitioner's

challenge to the Secretary's decision to take the Bradley Property into trust. In barring actions relating to the Bradley Property from the federal courts, Congress could rely not only on its Article III authority over the jurisdiction of the inferior federal courts, but also on its authority to legislate concerning the sovereign immunity of the United States.

1. The court of appeals decided this case on the ground that Section 2(b) of the Gun Lake Act eliminates the jurisdiction of the federal courts over actions relating to the Bradley Property and does so without violating any separation-of-powers principle recognized by this Court. J.A. 31-35. The government additionally argued in the court of appeals that Section 2(b) of the Gun Lake Act precludes judicial review of petitioner's APA claim because, for actions relating to the Bradley Property, the statute restores sovereign immunity previously waived by Congress in the APA, and there is no other applicable waiver that would permit this suit against agency officials to proceed. Gov't C.A. Br. 19-22. The court declined to address that argument, having concluded that the Gun Lake Act validly withdraws subject-matter jurisdiction over petitioner's claim. J.A. 43. The argument nevertheless provides an alternative ground on which to affirm the court's decision.

"It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (brackets omitted) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). The United States' consent to suit is a "prerequisite for jurisdiction" in the federal courts,

United States v. *Mitchell*, 463 U.S. 206, 212 (1983), and "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Meyer*, 510 U.S. at 475 (brackets in original) (quoting *Sherwood*, 312 U.S. at 586) (internal quotation marks omitted).

Furthermore, the United States, having given its consent to be sued, may "withdraw the consent at any time." *Lynch* v. *United States*, 292 U.S. 571, 581 (1934); see *Hans* v. *Louisiana*, 134 U.S. 1, 17 (1890) (sovereign may withdraw its consent "whenever it may suppose that justice to the public requires it"). The power to withdraw consent is not diminished when litigation is pending against the government. In *District of Columbia* v. *Eslin*, 183 U.S. 62 (1901), for example, claimants had obtained a judgment against the District of Columbia under a statute that waived sovereign immunity for suits against the District under public works contracts and made judgments payable by the United States. *Id.* at 63-64. While an appeal was pending, Congress repealed that authorization and provided that "all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid." *Id.* at 64 (citation and emphasis omitted). This Court dismissed the case for lack of jurisdiction and explained that "[i]t was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under th[e] act." *Id.* at 65; see *id.* at 66. The Court concluded that, under the "power that the court is allowed to exercise under th[e] act," it could not enter any order requiring the Secretary of the Treasury to pay the judgment. *Id.* at 66.

2. In this case, petitioner filed suit against the Secretary pursuant to the general waiver of sovereign immunity in the APA. See 567 U.S. at 215, 220-221. The APA authorizes a person who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to bring an action in federal court against "an agency or an officer or employee thereof," and it provides that such an action "shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. 702. As the Court explained in *Patchak I*, however, the waiver of sovereign immunity provided in the APA "comes with an important carve-out," 567 U.S. at 215—it does not apply, the Court noted, "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," *ibid.* (quoting 5 U.S.C. 702). The APA also does not apply where other "statutes preclude judicial review," 5 U.S.C. 701(a)(1), and the APA's waiver of immunity does not "affect[] other limitations on judicial review," 5 U.S.C. 702.

In *Patchak I*, the Court concluded that the Quiet Title Act, which waives sovereign immunity for quiet-title actions (but not for suits to quiet title to trust or restricted Indian lands), 28 U.S.C. 2409a, did not trigger the first carve-out from the APA quoted above because petitioner did not assert a right, title, or interest in the Bradley Property and his suit therefore was not a quiet-title action. 567 U.S. at 215-221. The Court acknowledged that it might make sense for Congress to reinstate the United States' sovereign immunity for other types of suits challenging the government's ownership of land, but "that is for Congress to tell [the Court], not for [the Court] to tell Congress." *Id.* at 224.

Congress did precisely that with respect to the Bradley Property. After this case was remanded to the district court, Congress passed the Gun Lake Act and provided that, "[n]otwithstanding any other provision of law, an action * * * relating to the [Bradley Property]," including any pending action, "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b), 128 Stat. 1913. Accordingly, "[n]otwithstanding [the APA]," which waives the government's sovereign immunity by stating that a suit brought by a person aggrieved by agency action "shall not be dismissed * * * on the ground that it is against the United States," 5 U.S.C. 702, Congress specified that no action relating to the Bradley Property may be filed or maintained in federal court and shall be dismissed, Gun Lake Act § 2(b), 128 Stat. 1913; see House Report 2 (describing Section 2(b) of the Gun Lake Act as a "broad grant of immunity from lawsuits pertaining to the Bradley Property"). Section 2(b) of the Gun Lake Act is a statute that "preclude[s] judicial review," 5 U.S.C. 701(a)(1), and the APA's waiver of sovereign immunity therefore does not apply, see also 5 U.S.C. 702 (APA's waiver of sovereign immunity does not "affect[] other limitations on judicial review."). The result is that cases relating to the Bradley Property, including petitioner's case, must be dismissed.

C. Section 2(b) Does Not Offend Constitutional Separation-Of-Powers Principles

Congress's authority to define and limit the jurisdiction of the federal courts is broad, but not unlimited. Congress has authority to "give, withhold or restrict [federal-court] jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline*, 260 U.S. at 234. In *Bank Markazi*

v. *Peterson*, 136 S. Ct. 1310 (2016), the Court described three general limitations imposed by separation-of-powers principles on Congress's exercise of its legislative authority. Congress cannot usurp a court's power to interpret and apply the law to the circumstances before it, for "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 1323 (brackets in original) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Congress cannot vest review of the decisions of Article III courts in the Executive Branch. *Ibid.* (citing *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)). And Congress may not undo a final judgment of a federal court or command a federal court to reopen a final judgment. *Ibid.* (citing *Plaut*, 514 U.S. at 219).[7]

Petitioner contends (Br. 12) that Section 2(b) of the Gun Lake Act intrudes on the judicial power because it directs that cases relating to the Bradley Property must be dismissed, after this Court concluded that peti-

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[7] In *Bank Markazi*, the Court also identified other specific constitutional provisions that constrain Congress's authority to affect pending cases by changing the law. Those limitations include the prohibitions on singling out persons for punishment, U.S. Const. Art. I, § 9, Cl. 3 (prohibiting ex post facto laws and bills of attainder); taking property without just compensation, U.S. Amend. V (Just Compensation Clause); and arbitrarily applying a statute retroactively in a manner that does not comport with due process, U.S. Const. Amend. V (Due Process Clause). See *Bank Markazi*, 136 S. Ct. at 1324-1325; see also *e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723, 792 (2008) (statute that withdrew federal jurisdiction to hear certain habeas corpus actions, including cases pending at the time of enactment, unlawfully suspended the writ of habeas corpus in violation of the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2). No issue arising under any of those provisions is at issue in this Court. See note 5, *supra*.

tioner's case may proceed, without a change in the underlying law. That contention is incorrect. Section 2(b) of the Gun Lake Act does change the law applicable to petitioner's claim by providing that any action relating to the Bradley Property may not be filed or maintained in federal court. Upon a court's conclusion that an action relates to the Bradley Property, the statute forecloses federal-court jurisdiction over the action and federal-court review of the Secretary's decision, and the action shall be promptly dismissed. Section 2(b) does not offend any separation-of-powers principle recognized by this Court.

1. Article III permits Congress to change the law applicable to a pending case

This Court has made clear that Congress has the authority to change the law applicable to pending cases. In *Bank Markazi*, the Court recognized that under a narrow exception to Congress's legislative authority based on separation-of-powers principles, Congress cannot direct the result in a pending case under existing law. 136 S. Ct. at 1324. Even before *Bank Markazi*, this Court's cases had drawn a distinction between statutes that change the law applicable to pending cases and statutes that attempt to direct a particular result without changing the applicable law. The Court had also made clear that Congress may amend the law in a way that makes the outcome of a pending case virtually certain so long as it leaves courts with some adjudicatory function to perform, and that Congress may legislate to affect one or a very small number of cases.

a. It is well established that Congress may enact a statute that changes the law applicable to pending cases. As Chief Justice Marshall explained in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801),

"if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110; see *Plaut*, 514 U.S. at 226. This Court therefore routinely applies changes in governing law to pending cases. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438-439 (1992); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 391-395 (1980) (*Sioux Nation*); *Schooner Peggy*, 5 U.S. (1 Cranch) at 110. That principle applies equally to cases withdrawing the jurisdiction of the federal courts over certain cases or restoring the United States' sovereign immunity with respect to those cases. See pp. 16-18, 25, *supra*.

Congress's alteration of the governing law, without more, does not invade the courts' judicial function under Article III. While a court "must apply" a law made applicable to a pending case, the court retains authority to construe the statute, to apply it to the facts before it, to make any necessary factual determinations, and to enter judgment for one party or the other. *Plaut*, 514 U.S. at 226; see *Robertson*, 503 U.S. at 438-439; *Pope* v. *United States*, 323 U.S. 1, 10-11 (1944).

b. While Article III permits Congress to alter the law governing a pending case, this Court held in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), that Congress invaded the judicial function when it instead purported to direct a particular result in a pending case. *Id.* at 146-147. *Klein* arose out of litigation brought by cotton claimants after the Civil War, under a statute that permitted them to recover the cost of any property seized from them and sold during wartime. Act of Mar. 3, 1863 (1863 Act), ch. 120, § 3, 12 Stat. 820; see *Klein*, 80 U.S. (13 Wall.) at 136-139. The statute required the

claimants to "pro[ve] to the satisfaction of [the Court of Claims]" that they had "never given any aid or comfort to the present rebellion." 1863 Act § 3, 12 Stat. 820. In 1863, President Lincoln issued a presidential pardon to any person who participated in the rebellion who later swore an oath of loyalty to the United States. *Bank Markazi*, 136 S. Ct. at 1323 (citing Proclamation No. 11, 13 Stat. 737). In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that the pardon provided "a complete substitute for proof that [the recipient] gave no aid or comfort to the rebellion," and the recipient was therefore eligible for compensation from the Court of Claims. *Id.* at 543.

Some members of Congress balked at the idea of allowing formerly rebellious southerners to recover from the United States Treasury by swearing a loyalty oath after the fact. Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts, in Federal Courts Stories* 88-92 (Vicki C. Jackson & Judith Resnik eds., 2010). One recipient of such a pardon was a successful southern merchant whose estate administrator was the claimant in *Klein*. After Klein received a substantial judgment from the Court of Claims, Congress enacted legislation requiring the courts to consider receipt of a presidential pardon as proof of a claimant's *disloyalty*. Act of July 12, 1870 (1870 Act), ch. 251, 16 Stat. 235.

The statute provided in relevant part that "no pardon or amnesty granted by the President * * * shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States." 1870 Act, 16 Stat. 235. Furthermore, the statute provided that acceptance of a pardon "shall be taken and deemed * * * in the * * * court

of claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States." *Ibid.* Upon proof that a pardon had been accepted, Congress provided that "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." *Ibid.* For cases on appeal, where judgment had been rendered in the Court of Claims in favor of a claimant based on a pardon, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Ibid.*

This Court held that the statute "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147. The precise basis for the holding in *Klein* is unclear, and in *Bank Markazi*, the Court noted that *Klein* has been called "a deeply puzzling decision." *Bank Markazi*, 136 S. Ct. at 1323 (citation omitted). The Court explained, however, that *Klein* does not inhibit Congress from amending applicable law. *Ibid.* And it described *Klein* itself as holding that Congress, having no authority itself to impair the effect of a pardon issued by the Executive, could not "direc[t] [a] court to be instrumental to that end." *Id.* at 1324 (brackets in original) (quoting *Klein*, 80 U.S. (13 Wall.) at 148). The Court thus explained in *Bank Markazi* that "the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon —standards Congress was powerless to prescribe." *Ibid.*

c. Before *Bank Markazi*, other decisions of this Court had similarly explained that *Klein* applies only when Congress enacts a statute that directs a particular result without changing the law. In *Robertson*, the Court upheld legislation that was enacted "[i]n response to" litigation challenging certain government timber-harvesting plans under various environmental statutes, and that "replaced" the standards set forth in those statutes. 503 U.S. at 433, 437. In sustaining the legislation, the Court reasoned that Congress permissibly altered the governing standards and did not either direct "findings or results under old law" or "instruct the courts whether any particular timber sales would violate" the new standards. *Id.* at 438-439. Thus, "[w]hatever the precise scope of *Klein* * * * , later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (second set of brackets in original) (quoting *Robertson*, 503 U.S. at 441); see *Miller* v. *French*, 530 U.S. 327, 349 (2000) (same).

Nor does *Klein* prevent Congress from amending the law in a manner that makes a particular outcome virtually certain, so long as Congress does not "prescrib[e] a rule of decision that le[aves] the court no adjudicatory function to perform." *Sioux Nation*, 448 U.S. at 392; see, *e.g.*, *Klein*, 80 U.S. (13 Wall.) at 146-147. In *Robertson*, the statute replaced the governing legal standards with a legislative compromise that permitted harvesting in all but certain designated areas. 503 U.S. at 434-435. The Court upheld the statute because it did not "instruct the courts" whether any particular actions violated the new standards. *Id.* at 439.

Article III likewise does not prohibit Congress from legislating, as it did in Section 2(b), to affect only "one

or a very small number of specific subjects." *Bank Markazi*, 136 S. Ct. at 1328 (citing, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 158-161 (1974); *Pope*, 323 U.S. at 9-14; *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 462-463 (1870); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-432 (1856)). The Court explained in *Bank Markazi* that although Congress frequently enacts generally applicable legislation, "that is by no means their only legitimate mode of action." *Id.* at 1327 (quoting *Plaut*, 514 U.S. at 239 n.9).

2. Section 2(b) changes the law applicable to petitioner's case

As described above, see pp. 18-23, 26-27, *supra*, Section 2(b) of the Gun Lake Act changes the law governing petitioner's claim by prohibiting claims relating to the Bradley Property from being filed or maintained in federal court, thereby eliminating the "competence [of federal courts] to adjudicate [that] particular category of cases." *Wachovia Bank*, 546 U.S. at 316. As the court of appeals correctly recognized, Section 2(b) "provides a new legal standard [for courts] * * * to apply: if an action relates to the Bradley Property," it cannot be maintained in federal court and "must promptly be dismissed." J.A. 34-35.

a. Petitioner is thus wrong to suggest (Br. 12, 16-18, 23) that Section 2(b) of the Gun Lake Act directs courts to dismiss pending cases "without amending underlying substantive or procedural laws." To support his contention, petitioner points to statements in the House and Senate Reports that the Gun Lake Act made no "changes in existing law." Br. 19-20 (citing Senate Report 4; House Report 5). That language was included in the

Senate Report pursuant to Rule XXVI(12) of the Standing Rules of the Senate, which requires the committee to provide a side-by-side comparison of any legislation that "repeal[s] or amend[s] any statute or part thereof." Standing R. of the S. XXVI(12) (2013); see Senate Report 4. Similar language was included in the House Report for the same reason under applicable House rules. R. of the H.R. XIII(3) (2013); see House Report 5. That language in the committee reports merely indicates that enactment of the Gun Lake Act did not require the actual amendment of any already-existing statute. It obviously does not refute the operation of the Gun Lake Act's text, which changed the law applicable to petitioner's suit through a stand-alone and tract-specific ratification of the Secretary's taking of the Bradley Property into trust and withdrawal of the federal courts' authority to entertain a suit concerning that property.

b. Petitioner suggests (Br. 11), however, that Congress violated the separation of powers because it ordered the courts to dismiss actions relating to the Bradley Property "without amending any generally applicable statute."[8] This Court has never imposed such a requirement. In *Robertson*, the Court rejected the argument that Congress "did not modify old requirements" when it enacted "an entirely separate statute" instead of amending an existing law. 503 U.S. at 439-440. The Court explained that this distinction made no difference

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[8] In the court of appeals, petitioner argued that Congress was required to amend either the IRA or the APA. Pet. C.A. Br. 22-29. Before this Court, however, petitioner states (Br. 11) that Congress may not direct that a case be dismissed "without any modification of generally applicable substantive or procedural laws," without specifically identifying those laws.

because "each formulation would have produced an identical task for a court adjudicating the * * * claims." *Id.* at 440; see *Bank Markazi*, 136 S. Ct. at 1318 (noting that statute at issue was "[e]nacted as a freestanding measure, not as an amendment" to existing law). Regardless of whether Congress enacts an entirely new statute or amends existing law, courts must give effect to either type of enactment as a duly-enacted law.

3. Section 2(b) does not direct a particular outcome under existing law

Section 2(b) of the Gun Lake Act does not run afoul of the rule announced in *Klein* because it does not "direct any particular findings of fact or applications of law, old or new, to fact." *Robertson*, 503 U.S. at 438; see *Bank Markazi*, 136 S. Ct. at 1323 (Congress cannot "usurp a court's power to interpret and apply the law to the circumstances before it.") (brackets and citation omitted). It creates new law for the courts to apply: an action that relates to the Bradley Property may not be filed or maintained in federal court.

a. Petitioner contends (Br. 16, 24-25) that the Gun Lake Act violates separation-of-powers principles because, similar to the statute in *Klein*, it "direct[s]" courts to dismiss pending cases. As petitioner points out (*ibid.*), certain language in Section 2(b) of the Gun Lake Act—the statement that an action relating to the Bradley Property "shall not be filed or maintained" in federal court and "shall be promptly dismissed," 128 Stat. 1913—is similar to the portions of the statute in *Klein* providing that (i) upon proof that a pardon had been accepted, "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant," 1870 Act, 16 Stat. 235; see Pet. Br. 16; and (ii) that in cases on appeal where judgment had

been rendered in favor of a claimant based on a pardon, this Court "shall * * * have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction," 1870 Act, 16 Stat. 235; see Pet. Br. 24-25. It was not that quoted language in the statute in *Klein*, however, that was problematic. It was, rather, the *basis* on which jurisdiction was withdrawn that led the Court to strike down the provision.

Indeed, the Court explained that, "[u]ndoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions." *Klein*, 80 U.S. (13 Wall.) at 145. The Court therefore acknowledged that "if th[e] act did nothing more, * * * [i]f it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make such exceptions from the appellate jurisdiction as should seem to it expedient," and "it would be [the Court's] duty to give [the law] effect." *Ibid.* (internal quotation marks omitted). The problem with the statutory denials of jurisdiction to this Court and the Court of Claims, the Court explained, was that those provisions required the courts to first "ascertain the existence of certain facts," which in turn required application of Congress's "arbitrary rule of decision" that a pardon must be construed as evidence of disloyalty. *Id.* at 146. In other words, it was the predicate for the dismissal for lack of jurisdiction—the alteration of the effect of a pardon that Congress had no power to make—that rendered the statute unconstitutional. See *Bank Markazi*, 136 S. Ct. at 1324.

Unlike the statute in *Klein*, the change in the law that Section 2(b) of the Gun Lake Act enacted did not

rest on a predicate determination that Congress was without authority to make. Congress clearly has authority to withdraw its grant of jurisdiction to the federal courts and its waiver of the sovereign immunity of the United States in those courts with respect to a particular subject matter—here, the Bradley Property. And in deciding whether Section 2(b) applies, the federal courts are "left to apply [their] ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 147. If the court concludes that the action relates to the Bradley Property, the action cannot be filed or maintained in federal court. If it does not, the suit may proceed.

Petitioner's amici contend that Section 2(b) "commands [courts] to take a specific action" (*i.e.*, dismissal), and thereby commands a particular result "without any room for judicial construction *other than* the threshold determination that the case at bar" relates to the Bradley Property. Fed. Courts Scholars Amicus Br. 20 (emphasis added). But this Court explained in *Bank Markazi* that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." 136 S. Ct. at 1325. It makes no difference that the factual findings the court is called upon to make under the new legal standard may be "uncontested or incontestable," such as the fact that the property to which petitioner's action relates is the Bradley Property. *Ibid.* (quoting *Pope*, 323 U.S. at 11). Whether "the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether" a case relates to the Bradley Property and, if so, to dismiss it. *Pope*, 323 U.S. at 11-12.

b. Petitioner and his amici focus on the last phrase of Section 2(b) of the Gun Lake Act, which provides that

any pending action relating to the Bradley Property "shall be promptly dismissed." 128 Stat. 1913; see Pet. Br. 17-18; see also Fed. Courts Scholars Amicus Br. 20-21 (arguing that even if the first clause of Section 2(b) is constitutional because it turns on a judicial determination that an action relates to the Bradley Property, the second clause is unconstitutional because it directs courts to dismiss the action). But the requirement that an action relating to the Bradley Property "shall be promptly dismissed" is the natural and indeed mandatory consequence of the court's determination that the action relates to the Bradley Property and thus cannot be filed or maintained in federal court. See *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514 (when jurisdiction is eliminated, "the only function remaining to the court is that of announcing the fact and dismissing the cause"); see also *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 865 (2009) (When "[foreign sovereign] immunity kicked back in[,] * * * the cases ought to have been dismissed, 'the only function remaining to the court [being] that of announcing the fact and dismissing the cause.'") (third set of brackets in original) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514); *Osbornes*, 76 U.S. (9 Wall.) at 575 ("[W]here a court has no jurisdiction of the case the correct practice is to dismiss the suit."). The requirement that a court dismiss an action relating to the Bradley Property after concluding that it lacks jurisdiction over the action thus does not require the court to do anything it is not already required to do based on the exercise of its judicial power to interpret the law and apply the law to the facts before it. See *Klein*, 80 U.S. (13 Wall.) at 145 (stating that if the statute had "simply denied the right of appeal in a particular class of cases," "it would be [the Court's] duty to give [the law] effect").

c. Finally, petitioner suggests (Br. 17) that Section 2(b) of the Gun Lake Act resembles the hypothetical statute, posited in the Chief Justice's dissenting opinion in *Bank Markazi*, directing that "Smith wins" the pending case of *Smith* v. *Jones*. See *Bank Markazi*, 136 S. Ct. at 1334-1335. According to petitioner, Section 2(b) dictates that the government wins by ordering actions relating to the Bradley Property to be dismissed. Petitioner is incorrect.

This Court's cases indicate that *Klein* does not prevent Congress from amending the law in a manner that makes a particular outcome virtually certain, so long as Congress does not "prescrib[e] a rule of decision that le[aves] the court no adjudicatory function to perform." *Sioux Nation*, 448 U.S. at 392; see, *e.g.*, *Klein*, 80 U.S. (13 Wall.) at 146-147; see p. 33, *supra*. And in any event, Section 2(b) of the Gun Lake Act is "outcome-altering," *Bank Markazi*, 136 S. Ct. at 1325, in a very different way than the hypothetical statute declaring that "Smith wins." The Chief Justice posited, and the entire Court agreed, that a statute simply decreeing that "Smith wins" a pending case would unconstitutionally encroach on the judiciary's power to decide cases on the merits. *Id.* at 1326; see *id.* at 1334-1335 (Roberts, C.J., dissenting). In that scenario, Smith receives a judgment from the court that awards relief. The decision whether to award relief is traditionally vested exclusively in the judiciary. *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011). In the Chief Justice's hypothetical, that power had been usurped by Congress. The Gun Lake Act, however, ensures that *no* party receives a judgment on the merits. Instead, it establishes at the threshold that the court lacks jurisdiction over the controversy and cannot issue a judgment on the merits or grant relief to anyone.

Congress supplies the applicable law (there is no jurisdiction over the action if it relates to the Bradley Property), and the courts apply that law. Those are precisely the roles assigned to each Branch under the Constitution's separation of powers. See *Plaut*, 514 U.S. at 222-223.

4. *This Court's prior statement in* Patchak I *that petitioner's suit "may proceed" does not entitle petitioner to a judgment on the merits notwithstanding the Gun Lake Act*

Petitioner repeatedly alludes (Br. i, 5, 18, 20, 28) to this Court's statement in *Patchak I* that his suit "may proceed," 567 U.S. at 212, and he implies that Congress cannot enact legislation under which his suit may not proceed without infringing on this Court's decision. The Court's conclusion that petitioner's case "may proceed," however, was made in the context of the Court's conclusion that petitioner had standing and that Congress had waived the United States' immunity to suit under the APA. *Ibid.* Congress's subsequent enactment of the Gun Lake Act amended the law applicable to petitioner's claim and provides that actions relating to the Bradley Property may not proceed in federal court. The statute, moreover, is not constitutionally suspect simply because it affects only one tract of land. This Court has made clear that the Constitution permits Congress to take actions that affect only a single subject or individual. See pp. 33-34, *supra*.

Under separation-of-powers principles, Congress may not "retroactively comman[d] the federal courts to reopen final judgments." *Bank Markazi*, 136 S. Ct. at 1323 (brackets in original) (quoting *Plaut*, 514 U.S. at

219).[9] But this Court's conclusion that petitioner's suit "may proceed" after resolution of threshold standing and immunity questions was not a final judgment, 567 U.S. at 212, and the Court's statement at that interlocutory stage therefore did not diminish the power of Congress to eliminate jurisdiction over a category of cases that includes petitioner's suit. Adherence to Congress's exercise of its authority to define or limit the jurisdiction of the federal courts does not offend separation-of-powers principles; it respects them. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). Just as this Court has the "province and duty * * * to say what the law is" in particular cases and controversies, *Marbury*, 5 U.S. (1 Cranch) at 137, Congress possesses the exclusive power to create inferior federal courts and to "invest[] them with jurisdiction either limited, concurrent, or exclusive, and [to] withhold[] jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good," *Cary*, 44 U.S. (3 How.) at 245. As this Court has recognized, "[t]o deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." *Ibid.*

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[9] *Plaut* did not involve a statute that altered the prospective effect of an injunction. See 514 U.S. at 232.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2017

APPENDIX

1. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913, provides:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Approved Sept. 26, 2014.

2. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chap-

ter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

3. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

ECORD
AND
RIEF

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No. 16-498

In The
Supreme Court of the United States

DAVID PATCHAK,
Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

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QUESTION PRESENTED

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (*Patchak I*), this Court held that, under then-existing law, when a plaintiff like Petitioner brings a suit challenging the federal government's decision to take a parcel of land into trust on behalf of an Indian tribe, "it falls within the [Administrative Procedure Act's] general waiver of sovereign immunity." *Id.* at 224. The Court recognized that the argument for foreclosing judicial review was "not without force, but it must be addressed to Congress," which had barred some, but not all, suits challenging the government's land ownership. *Id.* at 223. "Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call. *** [T]hat is for Congress to tell us, not for us to tell Congress." *Id.* at. 224.

In response, Congress introduced the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014), which (*inter alia*) barred all federal suits concerning the land at issue in *Patchak I*.

The question presented is:

Does a statute that bars all federal actions (pending and future) concerning a parcel of land taken into trust by the federal government violate the Constitution's separation-of-powers principles?

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In The
Supreme Court of the United States

No. 16-498

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the constitutionality of Section 2(b) of the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014). That Act, and additional statutory and constitutional provisions, are included in the addendum to this brief. Add. 1a-7a.

INTRODUCTION

Seeking to conjure a constitutional separation-of-powers problem, Petitioner ignores the context in which the Gun Lake Act—in particular, Section 2(b)—was enacted. Taking its cue from this Court's decision in *Patchak I*, which denied federal sovereign immunity under the Quiet Title Act but invited Congress to revisit that conclusion, Congress restored federal sovereign immunity for all suits relating to the trust land at issue. Intended as a "broad grant of immunity," Section 2(b) of the Act provides—in language mirroring the Administrative Procedure Act's initial waiver of sovereign immunity—that actions like Petitioner's (pending and future) "shall not be filed or maintained in a Federal court" and "shall be promptly dismissed." Because it is well established that Congress has the power to restore sovereign immunity "at any time," Section 2(b) adheres to, rather than evades, separation-of-powers principles. Accordingly, Petitioner's challenge—predicated on the false premises (i) that the Gun Lake Act did not amend the preexisting law and (ii) that this Court in *Patchak I* forever insulated this suit from a dismissal for immunity—fails at the start.

In any event, Section 2(b) does not otherwise transgress any of the separation-of-powers limitations that this Court has recognized. Even if Section 2(b) is read as excluding jurisdiction and "nothing more," it falls squarely within Congress's authority to define the jurisdiction of lower federal courts. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871). Unlike the provision in *Klein* (Petitioner's primary authority), Section 2(b) does not condition jurisdiction on any judicial merits

determination, interfere with any exercise of a coequal branch's power, or otherwise prescribe an unconstitutional rule of decision. For that reason, Section 2(b)'s withdrawal of jurisdiction over the class of cases relating to the federal land at issue passes constitutional muster.

STATEMENT OF THE CASE

A. Legal Framework

1. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA), waives the United States' sovereign immunity from suit for actions "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity," *id.* § 702. But that waiver is subject to congressional limitation: the APA does not "affect[] other limitations on judicial review," *id.*, "confer[] authority to grant relief" where another "statute that grants consent to suit expressly or impliedly forbids the relief which is sought," *id.*, or apply where other "statutes preclude judicial review," *id.* § 701(a)(1).

2. Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA), to promote economic development for Indians and tribal self-government. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). To further those objectives, the IRA authorizes the Secretary of the Interior, in his or her discretion, "to acquire *** any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, *** for the purpose of providing land for Indians." 25 U.S.C. § 5108. "Title to any lands or rights acquired pursuant to" the IRA

"shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.*[1]

3. The Gun Lake Trust Land Reaffirmation Act, signed by the President on September 26, 2014, comprises a naming section (Section 1) and a substantive section (Section 2) divided into three subsections. Section 2(a) provides that "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians" via a May 13, 2005 Department of Interior (DOI) notice "is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Add. 1a. Section 2(c) preserves the Tribe's future rights to seek additional trust-land acquisitions. Add. 2a.

The portion of the Act in dispute is Section 2(b), which provides: "Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed." Add. 2a.

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[1] Congress often authorizes the taking of land into trust for specific Indian tribes through legislation, including "tribe-specific" legislation. *See* 1-15 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.07 (2017) ("In addition to §5 of the IRA, there are many other tribe-specific statutes that authorize trust land acquisitions."); *see, e.g.*, Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, Pub. L. No. 100-420, 102 Stat. 1577 (1988).

B. Factual and Procedural Background

1. Since its first interactions with the federal government, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (also known as the Gun Lake Tribe) has sought to protect its sovereign character, nationhood, culture, and community. J.A. 53, 161-162. In 1795, the Tribe was first recognized by the federal government as a party to the Greenville Treaty, which, along with numerous subsequent treaties (including the Treaty of Chicago (1821) and the Treaty of St. Josephs (1827)), officially established tribal rights to live, hunt, fish, and gather on land ceded to the United States. J.A. 53, 89-97. Starting in 1855, however, the government began to implement policies that divested the Tribe of its ancestral lands. J.A. 53-54.

After more than a century without its own land, the Tribe sought to reaffirm its sovereign status under the government's modern acknowledgment procedures. J.A. 54. In 1998, the Tribe succeeded, and, in 2001, the Tribe identified a 147-acre parcel of land in Wayland Township, Michigan, to acquire as part of its initial reservation (the Bradley Property). *Id.* The parcel was less than three miles from land that the Tribe has historically occupied. J.A. 162. To generate revenue for the tribal government, promote self-sufficiency, and provide essential services such as housing, healthcare, education, and cultural preservation, the Tribe included a request to construct a gaming facility in its trust application. J.A. 54, 165.

In 2005, DOI published notice of the Secretary's decision to take the Bradley Property into trust. J.A. 54. The notice gave interested parties thirty days to

appeal the Secretary's decision. J.A. 163. An anti-gambling organization called Michigan Gambling Opposition (MichGO) filed suit. *Id.* Over the next three years, the Secretary and the Tribe litigated the case as it traversed the federal courts, and the D.C. Circuit affirmed the district court's judgment in the Tribe's favor. *Id.* The case concluded when this Court denied a petition for writ of certiorari. *Michigan Gambling Opposition v. Kempthorne*, 555 U.S. 1137 (2009). Nine days later, the Secretary acquired the Bradley Property on the Tribe's behalf. J.A. 54-55.

2. As one case ended, however, another began. One week after the D.C. Circuit denied MichGO's petition for rehearing, Petitioner David Patchak (an individual affiliated with MichGO) filed this lawsuit. J.A. 163-164. Commenced more than three years after the DOI published notice (but within the APA's general six-year statute of limitations), the suit alleged that the transfer was unlawful. J.A. 27. Petitioner argued that the Tribe was not under federal jurisdiction in 1934—as required by this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009)—and claimed that the Tribe's acquisition would disturb his "quiet life" in a rural part of Wayland Township. J.A. 27.[2]

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[2] In 2014, DOI acquired two other nearby parcels of land in trust for the Tribe. J.A. 75-78. In its Amended Notice of Decision accompanying that acquisition, DOI "evaluated whether the Secretary can exercise her authority to take the land in trust given the Supreme Court's decision in *Carcieri*." J.A. 82. DOI "conclude[d] that," consistent with *Carcieri*, "the Band was under federal jurisdiction in 1934." J.A. 85.

The district court dismissed the case for lack of prudential standing, but the D.C. Circuit reversed. The D.C. Circuit held that Petitioner possessed standing and further held that the APA waived the government's sovereign immunity despite the reservation of immunity for actions respecting tribal lands in the Quiet Title Act (QTA). 632 F.3d 702 (D.C. Cir. 2011).

This Court affirmed. 567 U.S. 209 (2012) (*Patchak I*). Distinguishing between a plaintiff who personally claims title and a plaintiff (such as Petitioner) who "bring[s] a different claim, seeking different relief," the Court interpreted the QTA to reserve immunity for the former type of claims only. *Id.* at 222. Because no other statute "expressly or impliedly forb[ade] the relief which [Petitioner] sought," 5 U.S.C. § 702, his suit "f[ell] within the APA's general waiver of sovereign immunity," 567 U.S. at 224.

Before remanding, the Court acknowledged that there might be good reasons to retain sovereign immunity "when a plaintiff like Patchak brings a suit like this one." 567 U.S. at 224. Because the "harm is the same whether or not a plaintiff claims to own the land himself," the Court recognized that "perhaps" such litigation should be foreclosed regardless. *Id.* at 223-224. The Court held, however, that the Tribe's remedy was political, not judicial: "[The Tribe's] argument is not without force, but it must be addressed to Congress." *Id.* at 223; *see id.* at 224 ("Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call.").

3. In response, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014). As noted, Section 2(a) of the Act "reaffirm[s]" the Bradley Property as trust land and "ratifie[s] and confirm[s]" the acquisition "taking that land into trust." Section 2(b) then forecloses litigation (both pending and future) over the Bradley Property by stating that any action "relating to the [Bradley Property] *** shall not be filed or maintained in a Federal court and shall be promptly dismissed."

The House Report reflects that the Gun Lake Act was intended to provide "an unusually broad grant of immunity" from suits relating to the Bradley Property. H.R. REP. NO. 113-590, at 2 (2014) (House Report). The Senate Committee on Indian Affairs describes the Act as designed to "prohibit *any* lawsuits" relating to "lands taken into trust by the *** DOI[] for the benefit of *** Pottawatomi Indians in the state of Michigan." S. REP. NO. 113-194, at 3 (2014) (Senate Report) (emphasis added). And the Senate Report notes that the Act was meant to "provide certainty to the legal status of the land, on which the Tribe has begun *** economic development for its community"—a status that had been "place[d] in jeopardy" by *Patchak I*. *Id.* at 2; *see also* House Report at 1 ("If [the Act] fails to be enacted, the continued operation of the Gun Lake Tribe casino will be placed in jeopardy.").[3]

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[3] The Tribe incurred approximately $195,000,000 in debt to develop the land and open the Gun Lake Casino, and the casino now employs over 1,000 people—making it one of the largest employers in the county. J.A. 54-55, 166.

4. Meanwhile, following this Court's *Patchak I* decision in 2012, the case sat dormant in district court as Petitioner failed to pursue his claims for over two years. It was only after the President signed the Gun Lake Act into law that Petitioner filed for summary judgment; Respondents cross-moved for summary judgment. Petitioner challenged the constitutionality of the Gun Lake Act—specifically, that it violated separation of powers, the First Amendment, the Fifth Amendment, and Article I's prohibition of bills of attainder. J.A. 57.

The district court rejected all of Petitioner's constitutional challenges, upholding the Act and dismissing the suit for lack of jurisdiction. J.A. 59-71. The court held "the Act's plain language and legislative history manifest a clear intent" to keep the Bradley Property free from suit by "withdraw[ing] this Court's jurisdiction." J.A. 59, 63. "This," the court explained, "Congress most assuredly can do." J.A. 63.

The D.C. Circuit affirmed. J.A. 24-45. The D.C. Circuit rejected Petitioner's separation-of-powers challenge. Citing *Bank Markazi v. Peterson*, among other precedents, the court of appeals noted that "Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases," including "when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases." J.A. 31; *see* J.A. 31-34 (discussing *United States v. Klein*, *Robertson v. Seattle Audubon Society*, and *National Coalition To Save Our Mall v. Norton*). Turning to the statute before it, the court of appeals "conclude[d] that the Gun Lake Act has amended the substantive

law applicable to Mr. Patchak's claims," including through its "clear withdrawal of subject matter jurisdiction in Section 2(b)." J.A. 34. Under the "new legal standard" the court was "obliged to apply," "if an action relates to the Bradley Property, it must properly be dismissed." J.A. 34-35. And because Congress "exercised its 'broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as 'plenary and exclusive,'" the court of appeals held it "ought to defer to the policy judgment reflected therein." J.A. 35 (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)).

The D.C. Circuit also acknowledged the government's proffered "alternative ground on which [the court] could rule"—namely, "that the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity." J.A. 43. The court of appeals viewed federal sovereign immunity as tied up with jurisdiction because the immunity argument went "to the court's authority to hear" the case, and "the 'terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). But because the court of appeals had already "conclude[d] that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn," the court stated that it "need not consider the matter further." *Id.* The court of appeals therefore did not reach the argument that the case should be resolved on narrower immunity grounds. Gov't C.A. Br. 19-22.

The D.C. Circuit rejected Petitioner's other constitutional claims for violation of the First Amendment, the Fifth Amendment, and Article I's Bill of Attainder Clause. J.A. 35-43. None of those issues is before this Court.

SUMMARY OF ARGUMENT

Whether viewed as a reinstatement of federal sovereign immunity or as an exercise of Congress's power to define the jurisdiction of lower federal courts, Section 2(b) of the Gun Lake Act hews to this Court's precedents and does not violate the Constitution's separation-of-powers principles.

I. Section 2(b) of the Gun Lake Act is best read as doing what this Court in *Patchak I* contemplated that Congress "could" (and perhaps "should") do: reinstating the government's sovereign immunity from suit over the Bradley Property.

It is well established that the United States cannot be sued without the consent of Congress and that Congress can withdraw its consent to be sued *at any time*—including during the pendency of an ongoing suit. This Court repeatedly has declined jurisdiction in such circumstances.

In *Patchak I*, this Court held that Petitioner's claim challenging the federal government's acquisition of the Bradley Property could proceed because it fell within the APA's general waiver of sovereign immunity and no other statute (such as the Quiet Title Act) foreclosed the claim. As the Court then recognized, however, Congress was free to reinstate federal sovereign immunity through legislation for suits (like Petitioner's) that challenge title to trust lands without claiming a competing

interest in the property: "that is for Congress to tell us, not for us to tell Congress." 567 U.S. at 224.

Congress accepted this Court's invitation by enacting the Gun Lake Act. Section 2(b) of the Act expressly forecloses suits, both pending and future, involving the Bradley Property—including any possible suit challenging the United States' trust title. Though Section 2(b) never uses the term "immunity," neither does the APA, the Quiet Title Act, the Tucker Act, or any number of other statutes under which Congress has defined the scope of the United States' immunity. Section 2(b), moreover, *reinstates* immunity using language that is the mirror image of the language that *waives* sovereign immunity in the APA: while the APA directs that pending suits "shall not be dismissed," Section 2(b) provides that they "shall be promptly dismissed." Finally, the legislative history of Section 2(b) confirms that the provision is a "broad grant of *immunity*." House Report at 2 (emphasis added).

The canon of constitutional avoidance removes any doubt that Section 2(b) should be construed as reinstating sovereign immunity. That construction is at least "fairly possible," and because a reinstatement of sovereign immunity permissibly changes the law, it wholly avoids the need to consider the sometimes difficult-to-draw line "between legislative and judicial power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting).

II. Alternatively, Section 2(b) can be upheld as an exercise of a core legislative function: defining the jurisdiction of the lower federal courts.

Article III expressly delegates to Congress the power to establish the jurisdiction of the "inferior" federal courts as a check on judicial authority. This Court therefore has acknowledged that Congress may invest or withhold jurisdiction in whatever manner it deems fit (subject only to other constitutional limits not at issue here). And when Congress's removal of jurisdiction touches a pending case, that case must be dismissed.

Section 2(b) fully comports with that authority. In jurisdictional terms, Section 2(b) provides that no action relating to the Bradley Property shall "be filed or maintained in a Federal court," and that any pending action "shall be promptly dismissed." As with sovereign immunity, Congress need not employ "magic words" to exercise that authority. And Section 2(b) warrants respectful review given that it implicates Congress's expansive powers to dispose of federal properties and to regulate Indian affairs.

Reading Section 2(b) as an exercise of Congress's authority to define the jurisdiction of the federal courts steers clear of every separation-of-powers limitation announced or contemplated by this Court: Section 2(b) does not instruct courts to interpret or apply law in a particular way, vest review of judicial decisions in a coordinate branch, or command the courts to reopen a final judgment. That is all the more true in this case because no court—not the district court, not the court of appeals, and not this Court—ever rendered a judgment (or even any finding) on the merits of Petitioner's APA claim.

Petitioner nonetheless contends that Section 2(b) runs afoul of *United States v. Klein*. But Section 2(b) is not similar to the extreme law at issue in

Klein; that law both impinged on the President's pardon power and directed courts to dismiss cases only if they first made dispositive findings adverse to the government. Nor is it similar to a law (like "Smith wins") directing a particular outcome on the merits; Section 2(b) simply removes jurisdiction altogether and "nothing more." And it makes no constitutional difference whether Congress removed jurisdiction by amending a "generally applicable statute" versus a more targeted enactment. This Court has squarely rejected the contention that legislation is unconstitutional just because it is particularized; regardless, this statute encompasses a class of cases broader than the one at issue here—namely, *all* suits (pending or future) relating to the Bradley Property.

Petitioner's proposed separation-of-powers rule—that Congress can "direct the result" in a case so long as it *also* "amends the law"—is both unclear and unworkable. Petitioner's rule would encourage separation-of-powers challenges almost any time Congress limited federal court jurisdiction in a way that affected pending cases—requiring an amorphous inquiry into whether the underlying law was amended—even though the Court has "regularly" applied such enactments. In any event, Section 2(b) satisfies even Petitioner's rule, in that it does amend the underlying law: it either reinstates sovereign immunity or otherwise imposes a new jurisdictional limit. Under Section 2(b)'s standard, courts are required to dismiss a case whenever an action relates to the Bradley Property. Application of that standard is no less an exercise of the judicial power because it is straightforward or uncontested.

ARGUMENT

I. SECTION 2(B) REINSTATES FEDERAL SOVEREIGN IMMUNITY FOR ACTIONS RELATING TO THE BRADLEY PROPERTY

Because Section 2(b) of the Gun Lake Act should be read as reinstating the government's sovereign immunity from suit—an enactment well within Congress's authority, as contemplated in *Patchak I*—it avoids any separation-of-powers concerns.

A. Congress Is Free To Withdraw Consent To Be Sued At Any Time.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). That "elementary" proposition, *United States v. Mitchell*, 445 U.S. 535, 538 (1980), has been "well settled and understood" since the time of the Constitutional Convention, *Williams v. United States*, 289 U.S. 553, 573 (1933); *see, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts *** without its consent and permission.") (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)). Consent to suit, moreover, is a "prerequisite for jurisdiction" in the federal courts, *United States v. Mitchell*, 463 U.S. 206, 212 (1983), and "the 'terms of [the] *** consent to be sued in any court define that court's jurisdiction to entertain the suit,'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see also United States v. White Mountain Apache Tribe*,

537 U.S. 465, 472 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity[.]").

Because any sovereign immunity waiver is "altogether voluntary on the part of the sovereign[], it follows that it may prescribe the terms and conditions on which it consents to be sued *** and may withdraw its consent whenever it may suppose that justice *** requires it." *Hans*, 134 U.S. at 17; *see e.g.*, *Lynch v. United States*, 292 U.S. 571, 581-582 (1934) ("Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time."); *Cummings v. Deutsche Bank und Disconto-Gesselschaft*, 300 U.S. 115, 119 (1937) ("The consent of the United States to be sued [is] revocable at any time."); *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 432 (1866) (Congress may "at any time withdraw a particular case" from the "cognizance" of the Court of Claims); *see also Maricopa Cty. v. Valley Nat'l Bank of Phoenix*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations.").

Congress's authority to reinstate sovereign immunity by withdrawing consent "at any time" does not exclude pending suits. In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), claimants had sued under a statute that consented to suit against the District regarding certain public works contracts and made judgments payable by the United States. After judgment had been entered in favor of claimants—and while an appeal and motion for a new trial were pending—Congress repealed the statute and provided

that "*all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid.*" *Id.* at 64 (citation omitted). This Court dismissed for lack of jurisdiction. It held that it "was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury," and Congress had subsequently "directed the Secretary not to pay any judgment." *Id.* at 65. Accordingly, "[a] proceeding against the Secretary *** would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the government." *Id.*

The APA, under which Petitioner brings this action, is an example of a limited waiver of sovereign immunity that permits actions against the United States seeking declaratory relief. *See* 5 U.S.C. § 702; *see also Patchak I*, 567 U.S. at 220 (Petitioner brought "garden-variety APA claim"). But the APA's immunity waiver is subject to an important exception: It neither applies where any other "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), nor "affects other limitations on judicial review," *id.* § 702. The former provision in particular "limits application of the entire APA to situations in which judicial review is not precluded by statute." *Webster v. Doe*, 486 U.S. 592, 599 (1988) (citing 5 U.S.C. § 701(a)(1)).

B. *Patchak I* Invited Congress To Reinstate Sovereign Immunity.

In *Patchak I*, this Court confronted, and rejected, the argument that the QTA was a statute that "'impliedly preclude[d]' judicial review" of Petitioner's claim within the meaning of the APA.

567 U.S. at 222 (citation omitted). That is because "[i]n the QTA, Congress made a judgment about how far to allow quiet title suits," but "Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses." *Id.* at 222-223. Accordingly, the Court concluded, the QTA's "reservation of sovereign immunity from actions respecting Indian trust lands" did not bar Petitioner's suit. *Id.* at 220.

Yet in reaching that conclusion, the Court recognized that Congress could legislate a broader immunity than the one the QTA provides: "Perhaps Congress would—perhaps Congress should—make the identical [immunity] judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call." *Patchak I,* 567 U.S. at 224. And with regard to whether "plaintiffs like Patchak" should be permitted to challenge trust-land determinations like this one, *Patchak I* gave the same answer: That is "for Congress to tell us, not for us to tell Congress." *Id.*

This Court's meaning was thus clear: Although the QTA did not preclude litigation over the trust status of the Bradley Property, Congress was free to achieve that result by reinstating federal sovereign immunity through legislation.[4]

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[4] Even Petitioner agreed with that proposition at oral argument in *Patchak I*:

> JUSTICE SCALIA: Of course, the government can fix that [susceptibility to suit for up to 6 years under the APA]. I mean, if this is indeed an inconvenient situation, that we think the government should not

C. Congress Through Section 2(b) Accepted *Patchak I*'s Invitation.

1. In the Gun Lake Act, Congress accepted this Court's invitation to restore the government's sovereign immunity for this action and others like it. Section 2(b) of the Act provides that, "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed." That is, "notwithstanding" the APA or any other law, no "action" relating to the Bradley Property—including this pending action against the United States—may be heard in federal court.

Congress's chosen language, in fact, is a mirror image of the immunity waiver in the APA itself: While the APA waives immunity by providing that suits against the United States "shall *not* be dismissed," 5 U.S.C. § 702 (emphasis added), the Gun Lake Act reinstates sovereign immunity by requiring that suits involving the Bradley Property "shall be promptly dismissed," Act § 2(b). Accordingly, whatever else Section 2(b) might accomplish, at a

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be in doubt for 6 years afterwards, I guess Congress can simply change it; right?

[PETITIONER'S COUNSEL]: Yes, Your Honor.

JUSTICE SCALIA: Totally within the control of Congress. We *** don't have to make up some limitation to protect *** the United States.

[PETITIONER'S COUNSEL]: I agree, Your Honor.

Tr. 51 (Apr. 24, 2012).

minimum it reveals Congress's unmistakable intent to foreclose challenges to the federal trust property at issue.[5]

It is true that the Act does not use the term "immunity." But that is of no moment. As an initial matter, any immunity waiver is "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see United States v. Williams*, 514 U.S. 527, 531 (1995) (Court will "construe ambiguities in favor of immunity" of United States). More fundamentally, this Court takes a functional, rather than formalistic, approach to analyzing immunity legislation. *See, e.g.*, *FAA v. Cooper*, 566 U.S. 284, 291 (2012) ("Congress need not state its intent [regarding sovereign immunity] in

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[5] Because "[a] proceeding against property in which the United States has an interest is a suit against the United States," the United States "is an indispensable party defendant" in any suit challenging title to the Bradley Property. *Minnesota v. United States*, 305 U.S. 382, 386-388 (1939). In *Minnesota*, this Court affirmed dismissal of a State condemnation proceeding of trust lands because, "[i]n its capacity as trustee for the Indians[,] [the United States] is necessarily interested in the outcome of the suit," and yet the State "cannot maintain this suit against the United States" without its consent. *Id.* at 387-388 Thus, any "action" relating to the trust status of the Bradley Property (including Patchak's) will necessarily involve the United States. *See id.*; *see also* FED. R. CIV. P. 19(a) (requiring party joinder if, *inter alia*, "in that person's absence, the court cannot accord complete relief among existing parties"); 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 19.05(2)(c) (2017) ("In determining whether a party is indispensable, a necessary party's immunity from suit is an important factor.").

any particular way. We have never required that Congress use magic words.").

Indeed, this Court has long construed a number of statutes as affecting federal sovereign immunity despite not using that term. As noted above, the APA is well understood to enact a "general waiver of sovereign immunity," *Patchak I*, 567 U.S. at 221, yet does not use the term "immunity." *See* 5 U.S.C. § 702 (providing that action "shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party"). Neither does the QTA, which likewise "waives the Government's sovereign immunity." *Patchak I*, 567 U.S. at 215; *see* 28 U.S.C. § 2409a(a) (providing that "[t]he United States may be named as a party defendant in a civil action under this section").[6]

When Congress specifically acts to *preserve* sovereign immunity, it often does so without using the term "immunity" as well. Despite the QTA's general waiver of sovereign immunity for land claims, the QTA affirms immunity for certain claims through the use of language akin to that used in the Gun Lake Act. *See* 28 U.S.C. § 2409a(h) ("*No civil action may be maintained* under this section by a

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[6] The same is true of the Tucker Act, 28 U.S.C. § 1491(a)(1) (granting the Court of Claims jurisdiction "to render judgment upon any claim against the United States" under specified circumstances), and the Federal Tort Claims Act, 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]").

State with respect to defense facilities" if a head of a Federal agency determines that they are being used for certain purposes, and "[t]he decision of the head of the Federal agency is *not subject to judicial review*.") (emphasis added). As noted, this Court has also upheld a statute that revoked "consent" to suit and payment of judgments from the treasury by requiring that "*all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid*." *Eslin*, 183 U.S. at 64 (citation omitted).

In addition, Congress on multiple occasions has chosen language nearly identical to that of the Gun Lake Act in statutes conferring "immunity" on private parties. For instance, the Foreign Intelligence Surveillance Act provides that, in some circumstances, "a civil action *may not lie or be maintained* in a Federal or State court against any person for providing assistance to an element of the intelligence community, and *shall be promptly dismissed*." 50 U.S.C. § 1885a(a) (emphasis added); *see In re Nat'l Sec. Agency Telecomm. Records Litig.*, 671 F.3d 881, 890 (9th Cir. 2011) (this "immunity" provision "passes constitutional muster"), *cert. denied*, 568 U.S. 958 (2012).[7]

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[7] Other examples include: the Protection of Lawful Commerce in Arms Act, which provides that certain qualified suits "shall be immediately dismissed by the court in which the action was brought or is currently pending," 15 U.S.C. § 7902(b), and which has been understood to "immunize[] a specific type of defendant from a specific type of suit," *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398 (2d Cir. 2008) (rejecting separation-of-powers challenge); and the Cybersecurity Information Sharing Act of 2015, which provides that "[n]o

2. The Gun Lake Act's legislative history, particularly read in light of *Patchak I*, confirms that Congress intended Section 2(b) as a "broad grant of *immunity*." House Report at 2 (emphasis added). As one sponsor put it: "This bill is really quite simple. It merely reaffirms [DOI's] action of taking this land into trust *** and prevents any future frivolous legal action on this matter." 160 CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Rep. Upton). Continuous litigation "casts a cloud of uncertainty on lands acquired in trust *** and ultimately inhibits and discourages the productive use of tribal trust land itself." *The Gun Lake Trust Land Reaffirmation Act: Hearing on S. 1603, S. 1818, S. 2040, S. 2041 and S. 2188 Before the S. Comm. on Indian Affairs*, 113th Cong. 9 (2014) (statement of Kevin Washburn, Asst. Secretary, Indian Affairs, U.S. Dep't of Interior). Congress believed that, "since *Carcieri* *** there has been an uptick in frivolous suits against tribal lands," and that "unless and until we have a *Carcieri*-fix legislation enacted, these types of piecemeal bills will become routinely needed to protect tribal lands that are rightfully held in trust." 160 CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Rep. Grijalva).

By placing all suits relating to the Bradley Property within the carve-out to the APA's general waiver of sovereign immunity, Section 2(b)

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cause of action shall lie or be maintained in any court against any private entity, and such action *shall be promptly dismissed*, for the monitoring of an information system *** conducted in accordance with this subchapter," 6 U.S.C. §§ 1501, 1505(a) (emphasis added).

withdraws the government's consent to suit in such cases. That is the sort of legislative remedy that the Court invited in *Patchak I* when decreeing that it is up to Congress to revise the scope of immunity.

D. The Canon Of Constitutional Avoidance Compels Reading Section 2(b) As Reinstating Sovereign Immunity.

1. Because the D.C. Circuit directly confronted and rejected Petitioner's separation-of-powers challenge to Section 2(b), it never reached the "alternative" argument that the Act could be upheld as a reinstatement of sovereign immunity. J.A. 43 (because Act "not constitutionally infirm, *** we need not consider the matter further"). But "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (alternation in original) (citation and quotation marks omitted).

Consistent with the "traditional presumption in favor of the constitutionality of statutes enacted by Congress," *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (alteration in original) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo*, 485 U.S. at 575.

Indeed, "when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,'" this Court's "'*duty* is to adopt the latter.'" *Gonzalez v. United States*, 553 U.S. 242, 251 (2008) (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002)) (emphasis added). The Court follows this "cardinal principle," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), even when an interpretation requires going beyond the statutory text, *see, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

2. Interpreting the Gun Lake Act as a sovereign immunity provision, however, requires no judicial creativity. Although Petitioner claims that the Act violates separation-of-powers principles because it purportedly directs a result "without amending underlying substantive or procedural laws," Pet. Br. i (Question Presented), the Gun Lake Act plainly *did* amend underlying law—namely, by negating the APA's waiver of sovereign immunity in this and similar cases.

In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), this Court employed the canon of constitutional avoidance to avoid reaching a separation-of-powers question in a similar circumstance. The challenger had argued that a statute "was unconstitutional under [*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)] because it directed decisions in pending cases without amending any law." 503 U.S. at 441. Because it was "possible"

to interpret the statute as "amend[ing] applicable law," however, the Court decided that it "need not consider whether [the challenger's] reading of *Klein* is correct" or otherwise "address any broad question of Article III jurisprudence." *Id.*

Interpreting the Gun Lake Act as amending the underlying law of sovereign immunity leads to the same result. Unlike in *Bank Markazi*, which involved private litigants, this Court has no need to consider the sometimes difficult-to-draw line "between legislative and judicial power." 136 S. Ct. at 1336 (Roberts, C.J., dissenting). Whatever else Section 2(b) does (if anything), it is best read—and at a minimum "reasonabl[y]" can be read, *Edward J. DeBartolo*, 485 U.S. at 575—as reflecting Congress's policy judgment to reinstate sovereign immunity from suit over the Bradley Property.

Consistent with the ordinary rule permitting Congress to pass "outcome-altering legislation in pending civil cases," *Bank Markazi*, 136 S. Ct. at 1325, and pursuant to this Court's invitation in *Patchak I*, 567 U.S. at 224, Congress in Section 2(b) exercised its authority to reinstate sovereign immunity "at any time." That construction avoids the separation-of-powers concerns posed by Petitioner and is reason enough to affirm the judgment below.

II. SECTION 2(B) IS CONSTITUTIONAL AS A JURISDICTION-DEFINING PROVISION

Even if Section 2(b) of the Gun Lake Act is not read to reinstate sovereign immunity, it survives constitutional scrutiny as an exercise of a core legislative function: defining the jurisdiction of the

lower federal courts. With the exception of cases involving fundamental rights or suspect classes, this Court has upheld Congress's authority to withdraw jurisdiction over a class of cases (including cases pending on appeal after a judgment) in every single decision but one: *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), a case involving a statute so convoluted, intrusive, and extreme that it rightfully stands alone in the annals of separation-of-powers precedent. Section 2(b) falls nowhere close.

A. Congress Permissibly Withdrew Jurisdiction Over A Class Of Cases Relating To The Bradley Property.

1. Congress has broad authority to define the jurisdiction of federal district courts.

Article III of the Constitution vests the judicial power in the Supreme Court "and in such inferior Courts as the Congress may *** ordain and establish." U.S. CONST. art. III, § 1. "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of th[is] authority *** conferred on Congress[.]" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *see Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("except in enumerated instances," "the judicial power of the United States *** [is] dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress"); *see also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 125 (1981) ("The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to this Court.").

Because "Article III left Congress free to establish inferior federal courts or not as it thought appropriate," *Lockerty*, 319 U.S. at 187, the Constitution does not create a freestanding "right of a litigant to maintain an action in a federal court," *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233 (1922). Instead, this Court has long recognized that the "power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction [or] *** withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Lockerty*, 319 U.S. at 187 (quoting *Cary*, 44 U.S. at 245).

Article III's broad grant of legislative authority—and its consequent check on judicial power—reflects "a deliberate compromise *** offered by James Madison and accepted by the Convention" to resolve a dispute between those who "favored requiring the creation of lower federal courts" and those who opposed their creation. Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power To Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 143 n.70 (1995). Far from "an abstract generalization in the minds of the Framers," the separation of powers "was woven into the document" they negotiated. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). "The judicial power of the United States [wa]s a constituent part of those concessions[.]" *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). Thus, "when a Court is created, and its operations confined to certain specific objects," it cannot "assume to itself a jurisdiction" without violating limits adopted by the Framers and ratified by the people. *Id.*; *see* THE FEDERALIST NO.

47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (defending the "partial agency" provided to the branches over "the acts of each other").

Just as Congress is empowered to confer jurisdiction, "jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234. Accordingly, this Court "ha[s] regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the *** suit was filed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994); *see, e.g.*, *Bruner v. United States*, 343 U.S. 112, 117 (1952); *Hallowell v. Commons*, 239 U.S. 506, 508-509 (1916) (case dismissed on appeal after Congress removed the courts' jurisdiction to ascertain the heirs to tribal property); *Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (case dismissed on appeal after change to jurisdictional diversity requirements); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (case dismissed on appeal—between the time of Supreme Court oral argument and decision—after Congress repealed its grant of jurisdiction).

In *Bruner*, for example, this Court encountered a claim for overtime compensation brought by a federal civilian fire chief appointed under authority delegated by the Secretary of War. *See* 343 U.S. at 113. Because the law at the time barred district court jurisdiction over "cases brought to recover fees, salary, or compensation for official services of officers of the United States," the petitioner contended that he was only an employee and not an "officer of the United States." *Id.* at 113-114 (citation omitted).

"After certiorari had been granted in th[at] case," however, Congress passed a law removing jurisdiction over claims brought by "employees" as well. *Id.* at 114.

The Court upheld the targeted removal of jurisdiction, confirmed its "consistent[]" practice of giving jurisdictional statutes immediate effect on pending cases, and dismissed the action for want of jurisdiction. *Bruner*, 343 U.S. at 116-117. Noting the common rule that "when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction," the Court found it "equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction." *Id.* at 116 (quoting *Merchant's Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1866)). The fact that the bare removal of jurisdiction applied to a specific class of cases and impacted a pending matter did not dictate a different conclusion.

To be sure, Congress must exercise this power "within limits" (*e.g.*, equal protection) imposed by the Constitution. Pet. Br. 24 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)); *see, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (holding that statute withdrawing federal jurisdiction to hear certain habeas corpus actions pending at the time of enactment unlawfully suspends writ). Petitioner fails, however, to cite a single case drawing into question a straightforward removal of federal jurisdiction like the one at issue.

2. Section 2(b) duly excludes jurisdiction over a class of suits.

Whether read as a reinstatement of the United States' sovereign immunity from suit, or instead as a jurisdiction-defining provision *simpliciter*, Section 2(b)'s effect is clear: No federal court has jurisdiction over any action relating to the Bradley Property. *See* J.A. 43 (noting relationship between sovereign immunity and subject matter jurisdiction); p. 16, *supra* (same).

"Subject-matter jurisdiction *** concerns a court's competence to adjudicate a particular category of cases." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006); *see Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017) ("[A] court's subject-matter jurisdiction defines its power to hear cases.") (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). Section 2(b) expresses Congress's plain—indeed, singular—intent to prevent the federal courts from "adjudicat[ing] a particular category of cases": those involving the Bradley Property. As the court of appeals recognized, Section 2(b) is thus properly read as a permissible exercise of Congress's "jurisdictional" authority. J.A. 30; *see Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 394 (1982) (designating as jurisdictional a statute that "speak[s] in jurisdictional terms").

Congress's withdrawal of jurisdiction here "warrants respectful review," *Bank Markazi*, 136 S. Ct. at 1317, for the additional reason that the legislation relates to two core congressional functions: Congress's power under Article IV "to dispose of *** Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, as well as its

"plenary" power to regulate Indian affairs, *Lara*, 541 U.S. at 200 ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"). As the D.C. Circuit explained, that Congress acted in furtherance of other constitutional powers lends further support to the validity of its exercise of jurisdiction-defining authority. *See* J.A. 35 (recognizing deference owed to "policy judgment" involving Indian affairs); *see also Bank Markazi*, 136 S. Ct. at 1317 (fact that political branches enacted legislation "in furtherance of their stance on a matter of foreign policy" "[a]dd[s] weight to our decision").

Petitioner argues that the D.C. Circuit "mistakenly" viewed the Act as "removing jurisdiction from the federal courts over any actions relating to" the Bradley Property. Pet. Br. 22 (emphasis omitted) (citing J.A. 25). But given that Section 2(b) explicitly prevents such actions from being "filed or maintained in a federal court," Congress could hardly have been doing anything else (other than restoring sovereign immunity, which has the same jurisdiction-removing effect). Certainly the Act is not identifying the elements of a claim, given that it creates none. Nor can the Act be read as a claims-processing rule, which would have set forth steps for *Petitioner* to satisfy. *See Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("'[C]laims-processing rules' *** requir[e] that the parties take certain procedural steps at certain specified times.") (citation omitted); *Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) ("[The Court has] treated as nonjurisdictional *** threshold requirements that claimants must complete[.]"). Instead, the text of Section 2(b) is directed at courts,

not claimants, and reflects an intent to foreclose all federal court adjudication of suits relating to the Bradley Property.

Petitioner also contends that Section 2(b) cannot be jurisdictional because "the word 'jurisdiction' does not appear anywhere in its title, headings or text." Pet. Br. 23. But as with sovereign immunity (p. 21 *supra*), Congress need not "incant magic words" to exercise its jurisdictional power. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *see, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012) (recognizing that the phrase "an appeal may not be taken to the court of appeals *** from [a particular order]" employs "jurisdictional terms") (citing 28 U.S.C. § 2253); *cf. Keene Corp. v. United States*, 508 U.S. 200, 208-209 (1993) (characterizing statutory change from "[n]o person shall file or prosecute" to "shall not have jurisdiction" as "nothing more than a change 'in phraseology'") (alteration in original) (citing 28 U.S.C. § 1500). In *National Coalition To Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002), a statute provided that certain administrative decisions shall "not be subject to judicial review"; even though that statute (like Section 2(b)) did not use the term "jurisdiction," it was considered a valid withdrawal of "subject matter jurisdiction" over a pending case. *Id.* at 1094; *see also Bank Markazi*, 136 S. Ct. at 1328 (citing *National Coalition* approvingly as an example of a decision holding that a targeted law can be a valid exercise of Congress's legislative power).

In any event, the question on appeal is *not* whether Section 2(b) allows Petitioner's action to survive; it is whether the Constitution allows Section

2(b) to survive. The Court's recent efforts to "bring some discipline" to its own "use of the term 'jurisdictional,'" *Gonzalez*, 565 U.S. at 141, do not disturb this Court's "plain duty" to adopt any "possible interpretation[] of a statute" that will allow the Court to uphold the law, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see* pp. 24-26, *supra* (discussing canon of constitutional avoidance). That duty is all the plainer in a structural challenge to Congress's jurisdictional authority. *See Steel Co.*, 523 U.S. at 101-102 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

B. Section 2(b) Comports With Well-Established Separation-Of-Powers Principles.

Against the backdrop of Congress's broad powers to define the jurisdiction of the federal courts, Section 2(b) of the Act must be construed as consistent with separation-of-powers principles. "[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [a coequal branch] from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Through Section 2(b)'s removal of federal jurisdiction over all claims relating to the Bradley Property without more, Congress exercised its own constitutional functions while steering clear of those assigned to the judiciary.

1. Section 2(b) does not transgress any separation-of-powers limitation recognized by this Court.

This Court "affirmed" last Term that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases" without intruding on the judiciary's constitutional function. *Bank Markazi*, 136 S. Ct. at 1325 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995), and *Robertson*, 503 U.S. at 441). In *Robertson*, for example, Congress faced a complex policy question raised by pending litigation. 503 U.S. at 431-434. "In response to this ongoing litigation," Congress enacted a narrow statute that applied only "within a geographically and temporally limited domain," and that identified the "pending cases *** by name and caption number." *Id.* at 433, 440. Although the amendment had a case-dispositive effect on "two pending cases," this Court rejected the argument that the law "purported to direct the results" in those cases and instead unanimously upheld the law. *Id.* at 436.

Later, in *Bank Markazi* itself, this Court held that a statute rendering a specific set of assets available to satisfy specific creditors in a specific proceeding (identified by docket number) was constitutional, because Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." 136 S. Ct. at 1317.

In reaching its conclusion, *Bank Markazi* identified three clear principles for determining whether Congress has required federal courts to exercise the judicial power in an unconstitutional

manner. *See* 136 S. Ct. at 1323. First, Congress may not "usurp a court's power to interpret and apply the law to the [circumstances] before it." *Id.* (alteration in original) (citation omitted). Second, Congress may not "vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S. at 218 (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 409 (1792)). Third, Congress may not "retroactively command[] the federal courts to reopen final judgments." *Id.* at 219.

Section 2(b) of the Gun Lake Act does none of these things. It does not: (1) instruct courts to interpret existing law (or apply it to the facts) in a particular way; (2) vest review of judicial decisions in the Executive Branch; or (3) command the courts to reopen a final judgment (as none had been entered in this case).

Petitioner's argument instead is that Section 2(b) runs afoul of other purported "principles recognized and secured in the Court's prior decisions," primarily *United States v. Klein*. Pet. Br. 16. *Klein*'s infamous opacity notwithstanding, *see Bank Markazi*, 136 S. Ct. at 1323, Section 2(b) fits well within the limits of *Klein* and the cases applying it.

"*Klein* involved Civil War legislation providing that persons whose property had been seized and sold in wartime could recover the proceeds of the sale in the Court of Claims upon proof that they had 'never given any aid or comfort to the present rebellion.'" *Bank Markazi*, 136 S. Ct. at 1323 (quoting Act of March 3, 1863, ch. 120, § 3, 12 Stat. 820). Though Klein had given comfort to the rebellion, he had received a pardon from President Lincoln, which this

Court held in *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869), was sufficient to constitute evidence of loyalty. The executor of Klein's estate therefore sought to recover the value of property seized by the United States under the Court of Claims legislation.

While Klein's case was pending, Congress enacted new legislation providing that if a claimant had been offered a presidential pardon as proof that he had not given aid, it would instead be construed as proof of the opposite. *Klein*, 80 U.S. at 143-144. Moreover, the Act created a jurisdictional withdrawal conditioned on a merits determination: "*on proof of such pardon and acceptance*, *** the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." Act of July 12, 1870, § 1, 16 Stat. 230, 235 (emphasis added). Congress adopted a similar rule for cases on appeal: "[I]n all cases where judgment shall have been heretofore rendered in the court of claims *in favor of any claimant* on any other proof of loyalty than such as is above required and provided *** the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Klein*, 80 U.S. at 134.

This Court offered a few rationales in holding the statute unconstitutional. First, the Court was unanimous that the statute "infring[ed] the constitutional power of the Executive" by "impairing the effect of a pardon," *Klein*, 80 U.S. at 147; *see also id.* at 148 (Miller, J., dissenting) ("I do agree *** the [A]ct, is unconstitutional, so far as it attempts to prescribe *** the effect to be given to an act of pardon."). Second, the majority faulted Congress's

conditioning of jurisdiction on a particular merits determination. *Id.* at 147 (Congress cannot require a court to decline jurisdiction "because and only because" the court makes a decision that will favor one party). Third, the majority reasoned that the law prescribed an unconstitutional rule of decision—namely, it forced the courts to destroy a vested right. *Compare id.* at 142 ("[Once the] conditions [of the pardon] *** had been satisfied, *** [t]he restoration of the proceeds became the absolute right of the persons pardoned[.]"), *with id.* at 150 (Miller, J., dissenting) ("[W]here the property has already been seized and sold," pardon did not restore vested right.).

The Gun Lake Act conflicts with none of *Klein's* rationales: the Act does not interfere with an Executive function (or any other freestanding constitutional provision); it does not condition removal of jurisdiction on a particular merits determination; and Petitioner claims no vested right.

2. Petitioner's arguments overread Klein.

Petitioner argues that Section 2(b) offends *Klein* in multiple ways. None has merit.

a. Petitioner first argues that Section 2(b) is an "unusual" intrusion on the judicial power because, "similar to a portion" of the statute at issue in *Klein*, Pet. Br. 16, 18, it "directed the federal courts to 'promptly dismiss' a pending lawsuit following substantive determinations by the courts," purportedly "without amending underlying substantive or procedural laws," *id.* at 18. According to Petitioner, "Congress has not previously enacted a statute with these characteristics," and "[t]his Court

has not previously confronted" a provision like Section 2(b). *Id.*

Petitioner is incorrect. Beyond the long line of authority cited in Part II.A.1, *supra*, this Court has in fact dismissed an action after Congress withdrew jurisdiction and directed that "*all proceedings pending shall be vacated.*" *Eslin*, 183 U.S. at 64. The Court came to the same conclusion (with respect to the same judgment-vacating statute) in *In re Hall*, 167 U.S. 38 (1897). These cases clearly involved congressional action following "substantive determinations by the courts": in one, a "final judgment" awaited motions for a new trial and an appeal, *Eslin*, 183 U.S. at 65; in the other, the parties were awaiting entry of judgment after remand from this Court, *Hall*, 167 U.S. at 41-43. And although Congress repealed the underlying enactment in its entirety (including the jurisdictional grant), the repealed law did not leave "the courts to apply new legal standards to the cases before them." Pet. Br. 16. Instead, the Court's rulings were explicitly based on Congress's decision "to take away the jurisdiction of the court of claims to proceed further in those cases which were founded upon the act thus repealed"—something "*congress had power to do.*" *Hall*, 167 U.S. at 42 (emphasis added).

Petitioner's argument fails for an additional reason: dismissal here did not in fact "follow[] substantive determinations by the courts." Pet. Br. 18. To the contrary, no court had made *any* substantive determinations with respect to Petitioner's claims. *See Patchak I*, 567 U.S. at 214 n.2 ("The merits of Patchak's case are not before this Court."); Pet. Br. 4 (noting that "the District Court

did not reach the merits of Petitioner's APA claim" before *Patchak I*); Pet. Br. 9 (noting that the district court dismissed because it "lack[ed] jurisdiction to reach the merits of plaintiff's claim") (alteration in original). After this Court had confirmed Petitioner's standing and rejected QTA immunity in *Patchak I*, the case remained dormant for two years on remand until enactment of the Gun Lake Act. And Congress in no way undid any constitutional or merits determination from *Patchak I*: this Court's statement that Petitioner's "suit may proceed" was based only on the Court's confirmation of prudential standing (which the Gun Lake Act did not disturb) and its statutory interpretation as to sovereign immunity (which the Court invited Congress to reconsider, *see* pp. 18-19, *supra*).

b. Petitioner next contends that Section 2(b) "compel[s] results 'under old law'" akin to a statute directing that "'Smith wins' his pending case." Pet. Br. 17 (citation omitted). All agree, of course, that "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'" *Bank Markazi*, 136 S. Ct. at 1323 n.17 (citation omitted); *see id.* at 1334-1335 (Roberts, C.J., dissenting). In other words, Congress cannot prescribe a particular merits outcome under the preexisting law in a particular case. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980) (Congress does "no[t] interfere[] with th[e] court's judicial function in deciding the merits of [a] claim" when it "in no way attempt[s] to prescribe the outcome of *** [a] review of the merits").

But that is not what the Gun Lake Act does. Section 2(b) did not compel a result on the merits;

rather, Congress removed federal court jurisdiction over a class of cases. *See* J.A. 63 ("There is a difference *** between a statute that dictates a particular decision on the merits, *** and a statute that altogether withdraws jurisdiction to reach the merits."). Congress in Section 2(b) therefore did not "commandeer[] the courts to make a political judgment look like a judicial one." *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting). By "wholly excluding the federal courts" from deciding these cases, Congress here "los[t] its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes"—precisely the choice that *amici* supporting Petitioner say Congress must make to *avoid* an unconstitutional intrusion on judicial power. *Amici* Br. 15 (citation omitted).

c. Petitioner relatedly argues that Section 2(b) is "an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction," akin to that found in *Klein*. Pet. Br. 25. Here, too, Petitioner fails to recognize that Congress does not impermissibly "imped[e] the judiciary from carrying out its *** responsibilities" simply by removing jurisdiction. *Id.* That is an argument against Article III's allocation of authority, not an argument against the Gun Lake Act.

Klein itself recognized Congress's broad powers to define federal jurisdiction, noting that "[u]ndoubtedly" Congress may "confer or withhold" jurisdiction as it sees fit. 80 U.S. at 145. If a statute "simply denie[s]" jurisdiction "in a particular class of cases, there c[an] be no doubt that it must be regarded as an exercise of the power of Congress"—"[a]nd if th[e] act d[oes] nothing more, it [is the

Court's] duty to give it effect." *Id.*; *see Ex parte McCardle*, 74 U.S. at 514 ("We are not at liberty to inquire into the motives of the legislature.").

The offending feature of the statute in *Klein*—the "something more"—was that, on its face, it *granted* jurisdiction over claims for certain property but then *removed* jurisdiction if (and only if) a claimant had been pardoned for taking part in the rebellion—a fact otherwise dispositive to judgment *in the claimant's favor*. *See Klein*, 80 U.S. at 143-146 ("The court has jurisdiction *** to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease[.]"). That conditional "heads I win, tails you lose" jurisdictional approach made it impossible for the Court to enter final judgment in any way but one:

> We are directed to dismiss the appeal, *if* we find that the judgment must be affirmed[.] *** Can [Congress require] *** the court [to] deny to itself the jurisdiction [previously] conferred, *because and only because* its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

Id. at 146-147 (emphasis added); *see also Loving v. United States*, 517 U.S. 748, 757 (1996) (describing *Klein* as a case in which Congress "deprive[d] court[s] of jurisdiction *based on* the outcome of a case") (emphasis added). Just as Congress cannot direct a judicial result on the merits with a law providing that "Smith wins," Congress cannot do so by saying "Smith wins or case dismissed."

Again, the Gun Lake Act does no such thing. Section 2(b) does not grant jurisdiction *on the condition* that a court finds the Bradley Property to be trust land; it unconditionally removes jurisdiction over *any* action relating to the property. As one of the *amici* supporting Petitioner has written elsewhere: "Whatever else may be said about" laws that "foreclose judicial review" altogether, "*Klein* simply isn't offended by them." Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SEC. L. & POL'Y 251, 259 (2011) (discussing, *inter alia*, 50 U.S.C. § 1885a, which states that an "action may not lie or be maintained in a Federal or State court against any person for *** assist[ing] *** the intelligence community, and shall be promptly dismissed"). Or as the scholars supporting Petitioner explained in this very case: "It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate." *Amici* Br. 15 (citation omitted). It is indisputable that Section 2(b) falls in the first (constitutionally permissible) category.

d. Lastly, Petitioner suggests that Congress violated the separation of powers by enacting the Gun Lake Act as a standalone statute, rather than amending a "generally applicable statute" like the APA or IRA. Pet. Br. 11 (The Act "directed the federal courts to 'promptly dismiss' Petitioner's lawsuit without amending [the IRA, the APA, or] any [other] generally applicable statute."). Petitioner never explains why amending a "generally applicable statute" or enacting a "private bill" makes any

constitutional difference. It does not. *See Bank Markazi*, 136 S. Ct. at 1328 ("This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects."); *Robertson*, 503 U.S. at 439-440 (Court "fail[ed] to appreciate the significance of" observation that "Congress might have modified [generally applicable law] directly" instead of "enact[ing] an entirely separate statute."); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.06[2] (2017) ("Between 1836 and 1946, Congress enacted 142" special jurisdictional statutes that "grant[ed] the Court of Claims jurisdiction, waiv[ed] sovereign immunity, and often also waiv[ed] otherwise applicable statutes of limitations for specific claims."). Nor does Petitioner offer any reason why the Constitution would allow Congress to immunize *all* federal properties from suit, *see Patchak I*, 567 U.S. at 224, but not select individual federal properties.

C. Petitioner's Proposed Rule Undermines Separation Of Powers And Overlooks How The Act Operates.

1. Petitioner's test does not solve separation-of-powers concerns.

Under Petitioner's view of *Klein*, Congress apparently can "direct the result" in a pending case *if* it "amend[s] *** substantive or procedural laws." *E.g.*, Pet. Br. 12. This confuses the Court's rule *for avoiding Klein* with a rule *interpreting Klein*. Indeed, it is Petitioner's interpretation, not Respondents' or the D.C. Circuit's, that would compromise the judicial function.

In *Robertson*, this Court upheld a statute because it "compelled changes in law, not findings or results under old law." 503 U.S. at 438. The holding avoided the need to interpret *Klein*. *See Plaut*, 514 U.S. at 218 ("Whatever the precise scope of *Klein*, *** its prohibition does not take hold when Congress 'amend[s] applicable law.'") (second alteration in original) (quoting *Robertson*, 503 U.S. at 441). The lesson is simple: if Congress provides new law (a legislative function) and courts apply that law to arrive at a new result (a judicial function), then *Klein* is not implicated. The lesson is *not* that Congress can "direct the result" in a pending case as long as it *also* provides new law.

Petitioner's mashup of concepts creates a standard too narrow to protect the Judiciary and too broad to avoid unnecessary conflict with the Legislature. On the one hand, the rule is too narrow because it would seemingly allow Congress to pass a law directing entry of "judgment for Smith" on the merits, *so long as* it was tucked into a statute amending the law underlying "Smith v. Jones." Indeed, as Professors Hartnett and Chemerinsky have observed, Petitioner's proposed rule (the same one proposed by the losing side in *Bank Markazi*) "runs headlong into" *Klein* itself because Congress *did* amend generally applicable law in that case. Br. of Constitutional Law and Fed. Courts Scholars at 5, *Bank Markazi*, No. 14-770 (U.S. Dec. 23, 2015).

As this Court observed in *Bank Markazi*, any law directing judgment for one party on the merits would likely raise two concerns: (1) it "may well be irrational and, therefore, unconstitutional" for reasons other than "separation-of-powers issues," and

(2) it may "fail[] to supply any new legal standard effectuating the lawmakers' reasonable policy judgment." 136 S. Ct. at 1326. Those problems are not avoided simply because Congress amends a "generally applicable statute" in the process of directing judgment.

On the other hand, Petitioner's rule is too broad because, by requiring an amendment of "substantive" law in any legislation that affected the outcome of a pending lawsuit, the rule would encourage challenges to a range of statutes that do nothing more than define the jurisdiction of the federal courts—even though this Court applies such statutes to pending cases "regularly." *Landgraf*, 511 U.S. at 274. Such a rule cannot be reconciled with *Klein*'s parallel recognition of a "duty to give *** effect" to a law that "simply denied the right of appeal in a particular class of cases" and "nothing more." 80 U.S. at 145.

In short, Petitioner's rule does not offer the kind of "clear distinctions" necessary for the separation of powers to provide a strong "structural safeguard." *Plaut*, 514 U.S. at 239 (emphasis omitted). Instead, adopting Petitioner's vague rule would "simply prolong[] doubt and multipl[y] confrontation" between the branches. *Id.* at 240.

2. Per Petitioner's rule, the Gun Lake Act changes underlying law and provides a new standard.

Even accepting Petitioner's interpretation of *Klein* as requiring a change in "underlying substantive or procedural law" before Congress withdraws jurisdiction, the Gun Lake Act easily satisfies that requirement. That is because the Act

amends underlying law. Primarily, Section 2(b) amends the underlying law of sovereign immunity, as explained above. *See* pp. 19-24, *supra*.

Alternatively, as the court of appeals held, the Gun Lake Act's "clear withdrawal of subject matter jurisdiction in Section 2(b)" also "changed the law." J.A. 34. Under Section 2(b), no action that relates to the Bradley Property may be heard in federal court. To trigger that bar, a *court* must decide whether a case "relates to" the Bradley Property. *See* J.A. 34-35 (Under "new legal standard" that the court was "obliged to apply," "if an action relates to the Bradley Property, it must promptly be dismissed."). Congress thus provided a new legal standard for all such actions going forward.[8]

True, the parties here agree that their case relates to the Bradley Property. But a threshold finding is no less relevant because it is straightforward, "uncontested[,] or incontestable." *Bank Markazi*, 136 S. Ct. at 1325. "[A] statute does not impinge on judicial power when it directs courts

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[8] Petitioner misconstrues the meaning of the statement in the legislative history that the Gun Lake Act makes no "changes in existing law." House Report at 5; Senate Report at 4. As the Senate Report makes plain, that statement was made "[i]n compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate," *id.*, which requires a committee report to include a "comparative print" showing through "appropriate typographical devices" any insertions or omissions of text that would need to be made to an *existing statute*. The Act made no such textual changes. The Report's language obviously does not say or imply that the new law *itself* paradoxically effectuated no change in law more generally or otherwise lacked any practical effect.

to apply a new legal standard to undisputed facts." *Id.* Whether "the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether" a case relates to the property and, if so, to dismiss for lack of jurisdiction. *Pope v. United States*, 323 U.S. 1, 11-12 (1944).

Amici supporting Petitioner resist this conclusion, arguing that Section 2(b) does not leave "any room for judicial construction *other than the threshold determination*" of whether the action relates to the Bradley Property. *Amici* Br. 20 (emphasis added). But the same could be said of the "threshold determination" of whether the sum or value at issue in a diversity case exceeds $75,000. 28 U.S.C. § 1332(a). That a "threshold determination" of jurisdiction may often be simple or undisputed does not make it any less a "judicial construction" or finding.

Amici eventually advance a narrower argument: While "the first clause of section 2(b) [that an action relating to the Bradley Property shall not be maintained] *** is constitutional" because it turns upon a judicial decision, the second clause of Section 2(b) is unconstitutional because it requires that such cases "be promptly dismissed." *Amici* Br. 20-21. That is a distinction without a difference. The "imperative tone" of a statute does not determine its constitutionality—the functional legal effect does. *Robertson*, 503 U.S. at 439. Section 2(b)'s dismissal "command" is still triggered by a *judicial* finding. Read "in the context of § [2(b)] as a whole," the second clause "simply imposes the consequences of the court's application of the new legal standard" in the first clause. *Miller v. French*, 530 U.S. 327, 349

(2000); *see also Ex parte McCardle*, 74 U.S. at 514 ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). And even if the second clause ("and shall be promptly dismissed") were somehow deemed constitutionally problematic, it would make no difference: The Court could simply sever *that specific clause*—leaving Section 2(b)'s first clause (and jurisdictional limit) in place.[9]

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[9] If the Court nonetheless decides Section 2(b) as a whole is unconstitutional, it should remand the case for application of Section 2(a) on the merits. The only question presented to the Court pertains to Section 2(b), *see* Pet. Br. i; neither Petitioner's certiorari petition nor merits brief challenges the severability of Section 2(b), *cf.* Pet. Br. 6 n.5; and remanding would allow the district court in the first instance "to apply its ordinary rules to the new circumstances created by" Section 2(a), *Klein*, 80 U.S. at 147. Section 2(a) ratifies and confirms a land transfer, and there is no doubt Section 2(a) can still operate as Congress intended without Section 2(b). *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-686 (1987) (rejecting a "presumption against severability" in absence of a severability clause); *see also Swayne & Hoyt v. United States*, 300 U.S. 297, 301-302 (1937) (Congress can "ratify" and "give the force of law to official action unauthorized when taken" by passing "a curative statute").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 11, 2017

ADDENDUM

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United States Public Laws

113th Congress—Second Session

Public Law No. 113-179, 128 Stat. 1913

September 26, 2014

Gun Lake Trust Land Reaffirmation Act

An Act To reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

SECTION 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * * *

United States Code

Title 5. Government Organization and Employees

Part I. The Agencies Generally

Chapter 7. Judicial Review

§ 2253. Appeal

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * *

United States Code

Title 5. Government Organization and Employees

Part I. The Agencies Generally

Chapter 7. Judicial Review

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

United States Code Annotated

Title 25. Indians

Chapter 45. Protection of Indians and Conservation of Resources

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made

pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

ECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 11 2017
OFFICE OF THE CLERK

No. 16-498

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

"The Framers viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 870 (1991). As James Madison explained to his colleagues in the First Congress: "[I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Congress 581 (1789).

Section 2(b) of the Gun Lake Act directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending any generally applicable statute. It was enacted to overcome this Court's decision in *Patchak I* (and *Carcieri v. Salazar*, 555 U.S. 379 (2009)), and "void" Petitioner's lawsuit, H.R. Rep. No. 113-590, at 2, after this Court held that it may proceed. *Patchak I*, 567 U.S. 209, 212 (2012).

The statute upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). Upholding it would leave no meaningful limitation on Congress's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees—and risk deep and lasting damage to our constitutional democracy.

The Court should hold that the Gun Lake Act is unconstitutional, and the judgment of the D.C. Circuit should be reversed.

I. Respondents Ignore the Founders' and This Court's Concern With Intermingled Legislative and Judicial Powers

The Framers of our Constitution "lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. They deliberatively and decisively rejected the practice of colonial legislative review of judicial decisions, believing the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies. *See* Brief for Petitioner ("Pet. Br.") 13 (citing cases). As Madison explained: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 182).

This Court accordingly has long recognized that "Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874); *see* Pet. Br. 14 (citing authorities). This limitation is essential to protecting the independence of the judiciary. *Cf. Miller v. French*, 530 U.S. 327, 350 (2000) ("[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the

constitutional design."); *see also Stern v. Marshall*, 564 U.S. 462, 482-83 (2011).

Respondents fail to even acknowledge—let alone address—the Founders' concern with intermingled legislative and judicial powers, and the indelible imprint that concern left on both our Constitution's design and this Court's separation of powers jurisprudence. Their silence is telling.

II. Respondents Ignore That Separation of Powers Principles Are Designed to Safeguard Individual Rights

There is no mystery about what transpired here. Confronted with this Court's holdings in *Patchak I* and *Carcieri*, the Tribe sought a way to terminate Petitioner's case, which they perceived as threatening their $241 million casino[1]—which was generating tens of millions of dollars in revenue shared by the Tribe, the State of Michigan, and local government. Wayland Br. 17; Brief of National Congress of American Indians as Amicus Curiae ("NCAI Br.") 13 n.6.

The Tribe and its supporters therefore launched a well-financed campaign[2] to convince Michigan's

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[1] *See* Brief of Wayland Township, et al., as Amici Curiae ("Wayland Br.") 21.

[2] Publicly available campaign finance records show the Tribe contributed nearly $175,000 to members of Congress and affiliated political action committees ("PACs") during the 27-month period between the Court's decision in *Patchak I* and the enactment of the Gun Lake Act. Of those contributions, the Tribe directed more than $50,000 to the campaigns and affiliated PACs of members of the Michigan congressional delegation; $50,000 to the Democratic and Republican House

Senators, members of its House of Representatives delegation, and other key members of Congress, to "void" Petitioner's suit by enacting the Gun Lake Act.

Because the statute would not alter or enact any generally applicable law[3] (applying on its face only to the Bradley Property, and as to pending matters only to Petitioner's lawsuit)[4], Michigan's legislators were able to secure support from almost all of their colleagues in Congress, whose constituents would

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and Senate congressional campaign committees; $15,000 to the PACs of Harry Reid and Nancy Pelosi, then the leaders of the congressional Democratic Party; and $10,000 to the campaigns or affiliated PACs of Doc Hastings, then the Republican representative from Washington's Fourth District, and Jon Tester, the Democratic senator from Montana. Rep. Hastings and Sen. Tester chaired the congressional committees with jurisdiction over the Gun Lake Act during the 113th Congress. In addition, publicly available lobbying disclosure records reveal that during the same period, the Tribe spent approximately $300,000 on outside lobbyists. *See* Ctr. for Responsive Politics, OpenSecrets.org, https://www.opensecrets.org (analysis on file with counsel).

[3] According to H.R. Rep. No. 113-590, the statute also would "not change general Indian law or policy." *Id.* at 2.

[4] There can be no genuine doubt the Gun Lake Act's *purpose* was to overcome "a U.S. Supreme Court opinion [*Patchak I*] that ha[d] allowed one individual to challenge the authority of the Secretary of Interior to take land into trust," and to "end" Petitioner's lawsuit. *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509, at 55 (2014) (statement of David K. Sprague); *see also id.* at 9 (legislation was "to address *Patchak [I]*") (statement of Kevin Washburn); 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (statement of Rep. Grijalva) ("[T]he Patchak case has [] put a Michigan tribe's trust land, upon which its casino supports approximately 1,000 much-needed jobs was constructed, very much in jeopardy.").

not be directly affected by (or likely have knowledge about) the statute.[5]

With no ability to counter the other side's political heft, Petitioner—an individual, with modest financial resources—did not stand a chance. The Senate approved S. 1603 by voice vote, and the House voted 359-64 in favor.

* * *

Embracing "a sharp necessity to separate the legislative from the judicial power," *Plaut*, 514 U.S. at 221, the Framers recognized—as has this Court—that "'there is no liberty [] if the power of judging be not separated from the legislative and executive powers.' [But] liberty . . . would have everything to fear from its union with either of the other departments." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 181); "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Respondents, however, neglect that "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011)). And in so doing, Respondents ignore that threats to individual

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[5] The Tribe also made contributions to members of Congress outside the Michigan delegation. *See supra* note 2.

rights are particularly acute when the political branches intrude upon the judicial power.[6]

This case highlights the importance of Article III safeguards designed to ensure a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980). "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1219 (2015) (Thomas, J., concurring).

III. Section 2(b) of the Gun Lake Act Violates Separation of Powers Principles Regardless of What Congress Intended to Accomplish in Section 2(a)

Petitioner maintains that Section 2(a) did not put the Bradley Property into trust. *See* Pet. Br. 19-20. But, more importantly, the presence of Section 2(a) in the Gun Lake Act does not cure the separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced a host of *new*, unsettled legal issues pertinent to Petitioner's APA

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[6] While Respondents fail to address the role of separation of powers in protecting individual rights, some of Respondents' amici concede "the separation of powers does protect an individual litigant from a legislative majority that would seek to decide his case alone." Brief of Amici Curiae Federal Courts and Federal Indian Law Scholars ("Indian Law Scholars Br.") 28.

case. *See* Pet. Br. 20. However, with Section 2(b), Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts. *See* Pet. Br. 21 (citing cases).

But Respondents are correct: Section 2(a) "is not directly at issue here" and "[t]he portion of the Act in dispute is Section 2(b)." FR Br. 13; Tribe Br. 4.

* * *

Separation of powers cases should be decided not by "formalistic and unbending rules," but "with an eye to the practical effect" the practice "will have on the constitutionally assigned role of the federal judiciary." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).[7] Mechanical checklists, which the Court has eschewed in other contexts, *see, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983), rarely have utility in separation of powers cases. *See Schor*, 478 U.S. at 857 ("[O]ur Article III precedents . . . counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries.").

Ignoring both the Founders' and this Court's concern with intermingled legislative and judicial powers, and the role of separation of powers principles in safeguarding individual rights, Respondents defend the constitutionality of the Gun

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[7] *Cf.* NCAI Br. at 30 (urging Court to "read the Gun Lake Act in full context"); Wayland Br. 3, 7 (urging Court to employ "a functional approach" to assessing statute's constitutionality).

Lake Act using the kind of formalistic tests and mechanical checklists (along with a few strawmen[8]) that obscure rather than illuminate a separation of powers analysis.

For example, they defend the Gun Lake Act with the claim that "Congress has the authority to change the law applicable to a pending case." Brief for the Federal Respondents ("FR Br.") 29; *see also* Brief for Respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe Br.") 35. But that general proposition does not provide much guidance here. Respondents acknowledge separation of powers considerations can render such legislative action unconstitutional. And while they contend *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), recognized a "narrow exception" to Congress's authority, nothing in that decision suggested it provided an exhaustive list of statutes which could violate separation of powers principles. *Cf. Plaut*, 514 U.S. at 218 (finding statute offends "deeply rooted" "postulate of Article III" separate from two types of legislation "[o]ur decisions *to date* have identified") (emphasis added). Moreover, Petitioner's arguments that the Gun Lake Act is unconstitutional are fully consistent with the majority's decision in *Bank Markazi*, where the statute at issue "changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested and uncontested) found by the court." *Bank Markazi*, 136 S.Ct. at 1326. In

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[8] *See, e.g.*, Tribe Br. 14, 45-46 (distorting Petitioner's arguments, and portraying as proposed "rules").

contrast, here, Congress took Petitioner's case from the federal courts after they had issued substantive rulings, without changing any generally applicable law.

As for Respondents' premise that Section 2(b) actually "changed the law," they and their amici concede the statute did not alter or enact any generally applicable statute. So the purported change in the law is limited to the words in Section 2(b), which applies only to cases "relating to" the Bradley Property. But if a freestanding statute's command to dismiss a pending case were *itself* sufficient to constitute a "change in the law" capable of immunizing it from separation of powers scrutiny then the "change-in-the-law"-limitation on Congress's authority to direct outcomes in pending cases would be eviscerated. "The law" is different before and after *any* statute is enacted. But the pertinent question is whether it is different in any sense relevant to the inquiry before the Court.[9]

Respondents also claim "Congress may amend the law in a way that makes the outcome of a pending case virtually certain *so long as* it leaves courts with *some* adjudicatory function to perform." FR. Br. 29 (emphasis added). But it is only in a

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[9] Respondents' cases bear little resemblance to this matter. *See, e.g.*, *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) (applying new treaty to pending case where "no doubt" had been expressed about its constitutionality); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437 (1992) (statute "replaced [] legal standards . . . without directing particular applications under either the old or the new standards.").

tautological sense that the Gun Lake Act leaves something for the courts to do: every statute requiring dismissal of a pending case would have to specify the case(s) to which it applied—and a court would always have to make the determination whether a matter before it was such a case (even the hypothetical "Smith wins" statute, which all members of the *Bank Markazi* Court agreed would be invalid). Even more troublesome, however, is the suggestion that determining whether an action "relates to the Bradley Property" leaves the court a *meaningful* "adjudicatory function" sufficient to ward off separation of powers concerns. The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19. It is fanciful to characterize Section 2(b) as having left the courts to carry out their Article III function in Petitioner's case.

Respondents also suggest the Gun Lake Act can be upheld because its command that the courts "promptly dismiss" was directed more broadly than Petitioner's pending case.[10] While it is true the words of Section 2(b) apply to "an[y] action . . . relating to" the Bradley Property, the statute's application to cases pending "as of the date of enactment" "only affected [Petitioner's] lawsuit," as the D.C. Circuit correctly acknowledged. JA 35; *see*

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[10] *See* Brief for the U.S. House of Representatives as Amicus Curiae ("House Br.") 12 ("section 2(b) is not addressed solely to petitioner's lawsuit").

also JA 59 (District Court finding Congress had "a clear intent to moot this litigation"); H.R. Rep. No. 113-590, at 2 ("S. 1603 would void [Petitioner's] pending lawsuit").[11] Again, this stands in contrast to *Bank Markazi*, which concerned "a category of postjudgment execution claims filed by numerous plaintiffs" ("more than 1,000 victims") in "multiple civil actions" ("16 suits"). *Bank Markazi*, 136 S.Ct. at 1317. The Gun Lake Act's narrow focus evidences that its purpose and effect was to "void" Petitioner's lawsuit, H.R. Rep. No. 113-590, at 2, stripping him of the right to continue pursuing his "garden variety APA claim." *Patchak I*, 132 S.Ct. at 2208.

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[11] The Court has routinely explained it does not focus on a statute's words to the exclusion of considering its practical effects. *See, e.g.*, *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1795 (2015) (considering "not the formal language" of the statute "but rather its practical effect"); *United States v. Hatter*, 532 U.S. 557, 573 (2001) ("The practical upshot is that the law permitted nearly every current federal employee, but not federal judges, to avoid the newly imposed financial obligation."); *Schor*, 478 U.S. at 851 ("[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."). Even some of Respondents' amici acknowledge the Gun Lake Act should be found unconstitutional if the Court "concludes that the *practical results* of the statute exceed Congress's powers under the Constitution." *See* Wayland Br. 7 (emphasis added).

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). When Congress directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving v. United States*, 517 U.S. 748, 757 (1996).

IV. The Gun Lake Act Violates Separation of Powers Principles Regardless of Whether It Is Properly Characterized as a Jurisdictional Statute

Respondents defend the constitutionality of the Gun Lake Act by arguing the statute is jurisdictional. Petitioner maintains the statute is best viewed as non-jurisdictional. *See* Pet. Br. 22-23.[12] But Section 2(b) of the Gun Lake Act would violate the separation of powers *even if* the statute

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[12] Respondents rely on *Keene Corp. v. United States*, 508 U.S. 200 (1993), but the statute at issue there divested the Court of Federal Claims of jurisdiction using language that does not require mind-reading or imagination, stating the court "shall not have jurisdiction" over certain claims. *Id.* at 207. *Keene* reflects that Congress knows how to "clearly state" a statute is jurisdictional. And, as the Court noted in *Keene*, it has a "duty to refrain from reading a phrase into [a] statute when Congress has left it out." *Id.* at 208.

were "jurisdictional."

Congress's broad authority to define the jurisdiction of the federal courts must be exercised consistent with all of the Constitution's requirements—including its separation of powers principles. *See* Pet. Br. 24 (citing cases).[13]

Even a purportedly jurisdictional statute may not impair the judiciary in the performance of its constitutionally-assigned responsibilities or intrude upon the central prerogatives of the judicial branch. With Section 2(b) of the Gun Lake Act, Congress undertook a form of legislative review of judicial decisions abhorred by the Founders—and upset "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut*, 514 U.S. at 224. Respondents have not cited any decision by this Court rejecting a separation of powers challenge to a statute stripping federal courts of jurisdiction in a particular pending case where the courts had already issued substantive rulings.[14]

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[13] Respondents concede Congress's authority to define jurisdictional limits is "not unlimited" and may "not [be] extended beyond the boundaries fixed by the Constitution." FR Br. 27; Tribe Br. 30 ("Congress must exercise this power 'within limits' . . . imposed by the Constitution."); *see also* Indian Law Scholars Br. 15 ("Congress's authority to legislate with respect to pending cases, including by withdrawing jurisdiction, is not unlimited.").

[14] Respondents' cases are inapposite. *See, e.g.*, *Merchants' Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 543 (1866) (no constitutional challenge to repealing statute); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) (no constitutional

Moreover, despite all of their musings about *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), neither Respondents nor their amici can credibly deny *Klein* directly refutes any claim that Congress's power to alter the jurisdiction of the federal courts necessarily precludes finding a particular jurisdiction-stripping statute violates separation of powers principles. There, the Court held that Congress had invaded the judicial power with a statute providing the Court would "have no further *jurisdiction* of the cause" and "shall dismiss the same for want of jurisdiction." *Id.* at 143 (emphasis added). As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.

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challenge to repealing statute); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) (no constitutional challenge to repealing statute); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (Congress may "withhold or restrict" jurisdiction in accordance with "the boundaries fixed by the Constitution"); *Bruner* v. *United States*, 343 U.S. 112, 114 (1952) (Congress' "power to withhold jurisdiction" was "not challenged"). They also cite *District of Columbia v. Eslin*, 183 U.S. 62 (1901) and *In re Hall*, 167 U.S. 38 (1897), but neither addressed a separation of powers challenge to Congress's action. Moreover, in stark contrast to the Gun Lake Act, in those cases the status of pending cases was altered by the complete repeal of a generally applicable statute—as the Tribe concedes (Tribe Br. 39).

V. The Gun Lake Act Did Not Restore Sovereign Immunity, But Is Unconstitutional Even If That *Post-Hoc* Interpretation of the Statute Were Credited

Respondents also defend the constitutionality of the Gun Lake Act by portraying it as a restoration of sovereign immunity which had been waived by the United States. This reinterpretation of the statute—never mentioned by either Respondent in opposing the Petition for Certiorari—is unavailing.

A threshold flaw with this argument is its incompatibility with Section 2(b)'s mandate that the courts "promptly dismiss." As the Court of Appeals explained, "if an action relates to the Bradley Property, it must promptly be dismissed." JA 34-35.[15] On its face, Section 2(b) of the Gun Lake Act forecloses judicial consideration of *any* "alternative" argument for dismissal of a pending case "related to" the Bradley Property.[16] And it is Section 2(b) which gives rise to the separation of powers problem before this Court.[17]

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[15] *See also* FR Br. 29 ("Upon a court's conclusion that an action relates to the Bradley Property . . . the action shall be promptly dismissed."), 34.

[16] Respondents appear to concede their sovereign immunity argument is an "alternative" one, separate from the separation of powers question. *See* FR Br. 24 ("The argument nevertheless provides an alternative ground on which to affirm the court's decision."); Tribe Br. 24. The D.C. Circuit never reached the "alternative" sovereign immunity argument. *See* JA 43; FR Br. 10.

[17] Even if the Gun Lake Act had sought to restore sovereign immunity, statutes concerning sovereign immunity (like those addressing federal court jurisdiction) are subject to

A second flaw with the sovereign immunity defense of the Gun Lake Act is that it is counterfactual. Sovereign immunity is not mentioned anywhere in the statute, which does not even refer—or limit itself—to suits against the United States. Nor is sovereign immunity mentioned in the legislative history,[18] or the White House's statement when signed by the President.[19] There is no canon of statutory interpretation which could support Respondents' *post-hoc* characterization of the Gun Lake Act. *See Richlin Sec. Serv. Co. v.*

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constitutional constraints, and can violate separation of powers principles.

[18] *See also* 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (no mention of sovereign immunity by any members of the House addressing the legislation); *id.* (statement of Rep. Upton) ("This bill is really quite simple. It merely reaffirms the U.S. Department of Interior's action of taking this land into trust for the Gun Lake Tribe and prevents any future frivolous legal action on this matter."). Recognizing the legislative history is devoid of references to sovereign immunity, neither the Federal Respondents nor the House of Representatives suggest otherwise. The Tribe, however, seizes on a solitary reference to the word "immunity" in H.R. Rep. No. 113-590. *See* Tribe Br. 8, 12. But the House Report was merely noting that Section 2(b)'s requirement of dismissal of "any action . . . relating to the land . . ." confers "an unusually broad grant of immunity from lawsuits pertaining to the Bradley Property," H.R. Rep. No. 113-590 at 2, and the context makes clear that use of the term "immunity" was not a reference to "sovereign immunity."

[19] "On Friday, September 26, 2014, the President signed into law . . . . S. 1603, the 'Gun Lake Trust Land Reaffirmation Act,' which reaffirms the status of certain land that has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami [*sic*] Indians . . . ." Press Release, The White House (Sept. 26, 2014), https://obamawhitehouse.archives.gov.

Chertoff, 553 U.S. 571, 589-90 (2008) ("traditional tools of statutory construction" apply when evaluating sovereign immunity); *see also Cummings v. Deutsche Bank*, 300 U.S. 115, 120 (1937) ("In the absence of unmistakable expression of purpose to that end, it may not reasonably be inferred that Congress intended to withdraw" consent to be sued); *cf. Patchak I*, 567 U.S. at 222 (finding "faulty" argument that QTA restored sovereign immunity by "negative implication").[20]

The counterfactual nature of this argument may explain why *neither* the Federal Respondents nor the Tribe made it before the District Court (and why the Tribe also did not make the argument before the Court of Appeals). JA 43.[21]

Third, even if the Gun Lake Act sought to rescind the APA's sovereign immunity waiver, it is

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[20] Parting ways with the Federal Respondents, the Tribe contends the doctrine of constitutional avoidance supports their alternative sovereign immunity argument. Tribe Br. 12, 24. But the doctrine is "an interpretive tool," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009), "for choosing between competing *plausible* interpretations of a provision." *McFadden v. United States*, 135 S.Ct. 2298, 2307 (2015) (emphasis added). For the reasons explained in this section, the interpretation proffered by Respondents is implausible. The doctrine is also irrelevant because, for the reasons explained above, construing the Gun Lake Act as attempting to restore sovereign immunity would not avoid or cure the separation of powers problems posed by the statute—thus, there is no "avoidance" to be had.

[21] The Court should not entertain a defense of Gun Lake Act based on an interpretation of the statute never advanced in the District Court—particularly when it was never mentioned in either Respondent's brief opposing the Petition for Certiorari. *See* SUP. CT. R. 15.2.

doubtful that would affect Petitioner's case. Sovereign immunity does not protect federal officials from suits for injunctive relief founded on a claim they have acted in excess of statutory authority. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are ultra vires his authority and therefore may be made the object of specific relief."); *see also* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 894 (7th ed. 2015) ("Larson and its progeny appear to state the currently controlling law on the conditions under which a suit against a government officer that has not been authorized by statute may be barred on the ground that it is really one against the sovereign and thus falls under the doctrine of federal sovereign immunity."). Here, Petitioner sued two federal officials seeking equitable relief, alleging they had acted in excess of their authority under the Indian Reorganization Act.[22]

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[22] See *Patchak I*, 567 U.S. at 213 (Petitioner's suit "requested only a declaration that the decision to acquire the land violated the IRA and an injunction to stop the Secretary from accepting title,"); FR Br. 3 ("Petitioner alleged that the Secretary's decision to take the Bradley Property into trust exceeded the authority provided by Congress").

VI. Congress's Lawmaking Authority Over Indian Affairs Cannot Cure the Gun Lake Act's Constitutional Deficiencies

Respondents make passing reference to Congress's "plenary" power to legislate in the area of Indian affairs. FR Br. 14; Tribe Br. 31-32. But neither contend that separation of powers principles do not apply to laws concerning Indian affairs. Nor could they make such a claim. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83 (1977).[23]

Any lawful action by Congress must flow from a power conferred to it by the Constitution. *See NFIB v. Sebelius*, 567 U.S. 519, 535 (2012). But even when empowered to legislate in a certain area, Congress's actions must be consistent with all of the Constitution's *other* requirements.[24] It is therefore unsurprising that the Court has found statutes violated separation of powers principles even when there was no question about Congress's authority to legislate in the area in question. *See, e.g.*, *Stern*, 564 U.S. at 482; *Plaut*, 514 U.S. at 225-26; *Bowsher v. Synar*, 478 U.S. 714, 732 (1986); *Northern Pipeline*

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[23] Notably, the NCAI does not invoke or rely on Congress's plenary power over Indian affairs in its amicus brief.

[24] Apparently overlooking this distinction, the House of Representatives incorrectly claims "[t]his case presents the question whether the legislative power conferred on Congress by the Constitution is sufficient to sustain legislation directing courts to 'promptly dismiss' any lawsuit relating to the Bradley property." House Br. 2.

Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982).

As with other areas of lawmaking, statutes concerning Indian affairs must comply with the Constitution's prescriptions and proscriptions. *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704, 712-18 (1987) (unconstitutional taking); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) ("[T]he idea that relations between this Nation and the Indian tribes are a political matter not amenable to judicial review . . . has long [] been discredited."); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935) (government's power over tribe "was subject . . . to pertinent constitutional restrictions").

Nor can the Gun Lake Act be saved by the contention that Congress enacted the statute to address what it perceived to be an important problem.[25] Noble intentions do not immunize a statute from constitutional review. *Plaut*, 514 U.S. at 228. The Constitution's restraints apply with full force, even when Congress aims to resolve a perceived problem affecting large numbers of Indian tribes. *See Babbitt*, 519 U.S. at 237; *Hodel*, 481 U.S. at 708, 718 (finding unconstitutional a statute enacted to remedy a "serious public problem" which was "disastrous for the Indians").

And the Court has made clear that separation of powers problems will not be overlooked when Congress pursues an expedient path to achieve

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[25] *See* Tribe Br. 8; NCAI Br. 23-25; Wayland Br. 19-20.

objectives rather than lawful means more politically-challenging to secure.[26] *See INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 449 (2010) (citing *Chadha*); *Bowsher*, 478 U.S. at 736 (citing *Chadha*); *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 948 (2017) (Thomas, J., concurring) ("We cannot cast aside the separation of powers and the Appointment Clause's important check on executive power for the sake of administrative convenience or efficiency.").

VII. *Klein* Supports the Conclusion That the Gun Lake Act Is Unconstitutional, But the Statute Is Unconstitutional Regardless of How *Klein* Is Understood

Respondents and their amici dedicate considerable attention to divining the meaning of *Klein*, 80 U.S. (13 Wall.) 128. But the Gun Lake Act is unconstitutional, regardless of how *Klein* is

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[26] *See* NCAI Br. 28 (Congress "reverted to *ad hoc* legislation" because "[t]o date, Congress has not had the votes necessary to pass an across-the-board solution"); *see also* H.R. Rep. No. 113-590, at 2 (2014) ("S. 1603 is necessary because there is no consensus in Congress on how to address *Carcieri*"); FR. Br. at 7 (same); 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (statement of Rep. Grijalva) ("I think unless and until we have a *Carcieri* fix legislation enacted, these types of piecemeal bills will become routinely needed . . . .").

understood—and would be unconstitutional even if *Klein* had never been decided.

Nevertheless, two observations about *Klein* are warranted.

First, neither Respondents nor their amici have identified *any* decision from this Court holding that Congress's general power to alter the jurisdiction of the federal courts precludes finding that a particular jurisdiction-stripping statute violates separation of powers principles. They also overlook that *Klein directly refutes* any such claim. However "puzzling" certain aspects of *Klein* may be, that point is unassailable.

Second, Respondents downplay *Klein's* relevance to the Gun Lake Act on the ground that *Klein* involved not only Congress's exercise of judicial power, but also implicated the relationship between Congress and the President. *See* Tribe Br. 13-14; FR Br. 32. But *Klein* cannot plausibly be read to avoid the Court's clear holding that Congress had "passed the limit which separates the legislative from the judicial power"—and did so, at least in part, because it directed dismissal of pending cases. *Klein*, 80 U.S. (13 Wall.) at 147; *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 7 (cautioning against reading *Klein* "simply as a case about the pardon power").

VIII. The Court Did Not "Invite" Congress to Enact the Gun Lake Act

The Tribe and some amici imply the Gun Lake Act should be upheld because it was "invited" by this Court.[27] That suggestion is nonsense.

In *Patchak I* the Court observed: "[p]erhaps Congress would—perhaps Congress should"—change the law to proscribe "the full range of lawsuits pertaining to the Government's ownership of land." 567 U.S. at 224. That remark, however, is a far cry from an "invitation" of any sort—and certainly not an endorsement of the later-enacted Gun Lake Act. *Cf. Babbitt*, 519 U.S. at 243 (finding statute unconstitutional and rejecting characterization of it as having "effectively anticipated the concerns expressed in the Court's [prior] opinion," *Hodel*, 481 U.S. at 718). And the Gun Lake Act itself is a far cry from the hypothetical legislative action the Court described, which imagined enactment of a generally applicable law covering "the *full range* of lawsuits pertaining to the Government's ownership of land." 567 U.S. at 224 (emphasis added); *cf. Boumediene v. Bush*, 553 U.S. 723, 735 (2008) (although *Hamdan* "noted that 'nothing prevented the President from returning to Congress to seek the authority he believes necessary' . . . [n]othing in that opinion can

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[27] Tribe Br. 19 ("Congress Through Section 2(b) Accepted *Patchak I*'s Invitation"); NCAI Br. 29 ("The Gun Lake Act should be construed as acceptance by Congress of this Court's offer to rectify the uncertainty and lack of finality injected into the trust acquisition process by *Carcieri* and *Patchak I*."); Indian Law Scholars Br. 2 ("The Gun Lake Act is . . . a direct response to this Court's invitation . . . .").

be construed as an invitation for Congress to suspend the writ").

CONCLUSION

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

While the adverse impact of the Gun Lake Act on Petitioner may not itself rise to the level of national significance, "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503.

The Court should hold that the Gun Lake Act is unconstitutional, and the judgment of the D.C. Circuit should be reversed and the case remanded for further proceedings.

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Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* FEDERAL COURTS AND FEDERAL INDIAN LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici law professors (listed in the Appendix) are leading scholars and teachers of federal courts law and federal Indian law who submit this brief in their individual capacities, not on behalf of their institutions. They study and write extensively on federal jurisdiction, the separation of powers, and Congress's authority in Indian affairs. *Amici* are well-versed scholars of Congress's longstanding authority to enact Tribe-specific lands acts, which have been vital to restoring Indian Nations' land base. *Amici* submit this brief to demonstrate that the Gun Lake Act is a common exercise of Congress's constitutional authority over federal jurisdiction in the unique area of Indian affairs.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016), this Court was clear: "Congress, our decisions make clear, may amend the law and make

[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. As required under S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein.

the change applicable to pending cases, even when the amendment is outcome determinative." Congress did just that with the Gun Lake Act. *See* Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014). In enacting that Tribe-specific lands act, Congress did not violate Article III or the separation of powers.

The Gun Lake Act is not the first time that Congress has enacted Tribe-specific legislation to settle an ongoing dispute about Indian lands. Beyond the nearly 400 treaties with Indian Nations, Congress has enacted countless Tribe-specific lands acts over the last 150 years to implement its government-to-government trust relationship with Indian Nations. Such Tribe-specific statutes often take land into trust for an Indian Nation, as the Gun Lake Act does, and limit federal jurisdiction, as the Gun Lake Act also does. This centuries-long history, absent from the briefing of the Petitioner and his *amici*, belies any argument that the Gun Lake Act is unprecedented.

The Gun Lake Act is not only an unremarkable exercise of Congress's Indian Affairs power, it is also a direct response to this Court's invitation to address disputes such as the Petitioner's ongoing dispute with the United States and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe"). In 2012, this Court held that the Petitioner could bring an Administrative Procedure Act ("APA") challenge to the Secretary of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi*

Indians v. Patchak ("*Patchak I*"), 567 U.S. 209 (2012). But this Court went on to recognize that Congress could, and "perhaps . . . should," withdraw federal jurisdiction by reinstating sovereign immunity. *Id.* at 224. And Congress did just that with Section 2(b) of the Gun Lake Act.

Congress's decision to withdraw federal jurisdiction was within constitutional bounds, and Petitioner's interpretation of *Klein* is untenable. Whatever else it stands for, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), does not support the Petitioner's argument that the Gun Lake Act must be unconstitutional because Congress directed a judicial outcome without modifying "generally applicable" laws. *See* Pet'r Br. 11. This Court decisively foreclosed that argument in *Bank Markazi*, when it recognized that "'[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.'" 136 S. Ct. at 1327 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)). And reading *Klein* to prohibit legislation that is tailored to resolve ongoing land disputes is irreconcilable with this Court's holdings that Congress may enact land-specific legislation to determine the outcome of pending litigation. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).

Although *Klein* is not a model of clarity, *amici* agree that the Gun Lake Act does not violate any holding of *Klein*. Unlike the statute at issue in *Klein*,

the Gun Lake Act does not forbid the Court to "give the effect to evidence which, in its own judgment, such evidence should have." 80 U.S. at 147. Because the Gun Lake Act does not intrude on the judiciary's role to weigh the merits of a case, but simply makes new law for the federal courts to apply, the separation of powers is not disturbed. By taking the Bradley Property into trust for the Gun Lake Tribe, and withdrawing federal jurisdiction over *any* action challenging that decision, Congress made outcome-determinative law requiring the federal courts to dismiss the Petitioner's action. Such a statute is well within Congress's authority to circumscribe the limits of federal jurisdiction. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

Finally, the Gun Lake Act does not present the parade of horribles that the Petitioner and his *amici* suggest. The Act is not a wholesale jurisdiction-stripping statute. It does not withdraw jurisdiction to challenge the Act itself on constitutional grounds. The Gun Lake Act is narrowly-tailored and makes new law concerning statutory challenges to the trust status of the Bradley Property. This case involves such a claim—a third-party challenge to Congress's decision about whether tribal property deserves protection through federal trust status. The Petitioner claims no vested property right in the Bradley Property—nor could he.

Consistent with its historical practice, particularly in the unique area of Indian Affairs, Congress had authority to declare the permanent trust status of the

Bradley Property and to withdraw jurisdiction over any action concerning that status.

ARGUMENT

I. The Gun Lake Act Makes New Law Concerning Indian Affairs.

This Court has recently reaffirmed that Congress may make new law that is outcome determinative in a pending case. *See Bank Markazi*, 136 S. Ct. at 1317 ("Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative."). When doing so, Congress is not limited to generally applicable legislation, but may enact specific laws for the federal courts to apply. *See id.* at 1327 ("'While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.'") (quoting *Plaut*, 514 U.S. at 239 n.9). In enacting such laws, Congress does not violate Article III or the separation of powers.

When it legislates in the field of Indian Affairs, Congress has, for more than a century, regularly enacted Tribe-specific legislation pursuant to its constitutional authority to implement the government-to-government relationship between the United States and Indian Nations. *E.g.*, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902). Indian lands issues lie at the heart of Congress's Indian Affairs power. And

congressional decisions about the management of specific Indian lands are by necessity particularized—just as they are when Congress legislates with respect to specific non-Indian lands. Where controversies arise about Indian lands, Congress has routinely enacted Tribe-specific lands acts and settled disputes by making new law. The Gun Lake Act is but one example of commonplace congressional action.

A. Congress Regularly Enacts Tribe-Specific Lands Acts And Settles Disputes Involving Indians.

The United States has undertaken a duty of protection to federally-recognized Indian Nations. This trust relationship arose first in the context of treaty relationships between the United States and Indian Nations. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-56, 560-61 (1832). This general trust relationship between the federal government and Indian Tribal governments distinguishes the field of Indian Affairs. *See, e.g., United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011).

Congress regulates this government-to-government relationship through legislation. And when enacting statutes concerning Indian Affairs, Congress routinely invokes the general trust relationship. *See* Restatement of the Law of American Indians, § 4, Reporters' Notes (Am. Law Inst., Tent. Draft No. 1, Apr. 22, 2015) (surveying federal statutes stemming from the trust relationship). Congress also regulates relationships

between the United States and specific Indian Nations. In addition to the 400-odd Indian treaties,[2] Congress has enacted untold numbers of Tribe-specific statutes covering a wide variety of subjects. *See* Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 77, 126-28 (2015) (finding that from 1975 to 2012, Congress enacted 353 Tribe-specific bills). For example, there are statutes extending or reaffirming federal acknowledgment of a Tribe's sovereignty,[3] acquiring and administering assets in trust for specific Tribes,[4] resolving boundary disputes,[5] settling water

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[2] Allison M. Dussias, *Let No Native American Child Be Left Behind: Reenvisioning Native American Education for the Twenty-First Century*, 43 Ariz. L. Rev. 819, 826 (2001) (noting that United States entered into roughly 400 treaties with Indian Nations between 1778 and 1871).

[3] *See, e.g.*, Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, §§ 4(a)(1), 6(c), 107 Stat. 1118, 1121 (1993); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, § 4, 108 Stat. 2156, 2157 (1994); Pokagon Band of Potawatomi Indians Restoration Act, Pub. L. No. 103-323, § 2, 108 Stat. 2152, 2153 (1994). For a full list of the 24 statutes extending, restoring, or reaffirming the federal acknowledgment of the sovereignty of 32 Indian Nations from 1977 to 2012, *see* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L.J. 955, 1010-16 (2016).

[4] *See, e.g.*, Pascua Yaqui Tribe Trust Land Act, Pub. L. No. 113-134, § 3, 128 Stat. 1732, 1732 (2014); Michigan Indian Claims Settlement Act, Pub. L. No. 105-143, § 108(f), 111 Stat. 2652, 2661-62 (1997); Act of June 20, 1966, Pub. L. No. 89-459, 80 Stat. 211 (conveying federal land in trust for the benefit of the Minnesota Chippewa Tribe).

[5] *See, e.g.*, Colorado River Indian Reservation Boundary Correction Act, Pub. L. No. 109-47, § 2, 119 Stat. 451, 452 (2005); Hoopa Valley Reservation South Boundary Adjustment Act, Pub.

rights disputes,[6] and providing for the management of the natural resources of specific Tribes.[7]

The United States has long had the authority to take land into trust for the benefit of an Indian Nation. This trust acquisition process is crucial to reconstituting a land base for many Indian Nations and is a centerpiece of Congress's policy of promoting Tribal self-determination and economic development. The Department of the Interior typically takes the lead in acquiring land into trust for Indian Nations. *See* 25 U.S.C. § 5108; 25 C.F.R. pts. 151 & 292. But Congress also regularly steps in with Tribe-specific legislation to settle disputes and provide needed repose.

This congressional practice is longstanding. Over the last 150 years, Congress has enacted dozens upon dozens of Tribe-specific statutes that resolve ongoing disputes between the United States, Indian Nations,

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L. No. 105-79, § 2, 111 Stat. 1527, 1527 (1997); Act of Nov. 23, 1988, Pub. L. No. 100-708, § 3, 102 Stat. 4717, 4718 (correcting boundaries of Goshute Reservation).

[6] *See, e.g.*, Fort McDowell Indian Community Water Rights Settlement Act of 2006, Pub. L. No. 109-373, § 3, 120 Stat. 2650, 2650-51 (2006); Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, § 104, 108 Stat. 4526, 4528 (1994); Ak-Chin Indian Community Act of 1978, Pub. L. No. 95-328, § 1, 92 Stat. 409, 409 (1978).

[7] *See, e.g.*, Act of Oct. 6, 1999, Pub. L. No. 106-67, 113 Stat. 979, 979 (providing for mineral leasing of specified Indian lands in Oklahoma); Act of July 7, 1998, Pub. L. No. 105-188, § 1, 112 Stat. 620, 620 (permitting mineral leasing of Indian land within Fort Berthold Indian Reservation when specified conditions are met); Salmon and Steelhead Conservation Act of 1980, Pub. L. No. 96-561, § 102, 94 Stat. 3275, 3275-76 (1980).

state and local governments, and private interests. *See generally* Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law § 5.06[1] (2012) ("Congress has resolved tribal claims involving individual tribes or tribes through legislation."); Carlson, *supra*, at 126 (finding that 36% of the Indian-related bills enacted by Congress from 1975 to 2012 were Tribe-specific bills). There are numerous federal land acts relating to Michigan Tribes alone.[8]

In settling Indian lands disputes, Congress necessarily regulates relationships among Indian Nations, states and localities, and non-Indians. For example, federal statutes often settle land disputes by delineating jurisdictional boundaries and providing for trust land acquisitions by the federal government.[9]

Settling such disputes often requires Congress to legislate with respect to the Article III courts. For example, Congress has imposed short limitations periods on challenges to the constitutionality of

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[8] *See, e.g.*, Michigan Indian Claims Settlement Act, 111 Stat. 265; Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, Pub. L. No. 100-420, 102 Stat. 1577 (1988); Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act, Pub. L. No. 99-346, 100 Stat. 674 (1986); An Act for the Restoration to Market of Certain Lands in Michigan, § 1, 17 Stat. 381 (concerning lands "in the reservation made for the Ottawa and Chippewa Indians of Michigan").

[9] *See, e.g.*, Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, § 9, 92 Stat. 813, 817 (1978); Puyallup Tribe of Indians Settlement Act, Pub. L. No. 101-41, §§ 4-5, 9, 103 Stat. 83, 88 (1989).

statutes that settle Tribal land claims.[10] It routinely has barred the potential claims of third parties (usually Tribal citizens) to ensure clarity and certainty in a land claims settlement.[11] On still other occasions, Congress has legislated to treat prior claims regarding Indian lands as if they never "existed."[12] Through these means and others, Congress has withdrawn judicial review of claims involving Indian lands.

When enacting Tribe-specific lands acts, Congress has assessed the complex interests concerned and made new law to ensure clarity and certainty regarding land ownership. *See, e.g.*, Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, §§ 2-3, 114 Stat. 1875, 1875-76 (2000). Such certainty, Congress has found, is necessary for Tribal economic development, including for gaming enterprises. *See, e.g.*, Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 2(a), 108 Stat. 3501, 3501 (1994). Special jurisdictional acts concerning individual Indian Nations are also nothing new. Congress has broad authority to confer or to withdraw federal

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[10] *See, e.g.*, Wampanoag Tribal Council of Gay Head, Inc. Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 10, 101 Stat. 704, 710; Seminole Indian Land Claims Settlement Act, Pub. L. No. 100-228, § 8(a), 101 Stat. 1556, 1561 (1987).

[11] *See, e.g.*, Act of Nov. 24, 1980, Pub. L. No. 96-484, § 4, 94 Stat. 2365; Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, § 12, 108 Stat. 4632, 4642 (1994); Catawba Indian Tribe of South Carolina Land Claims Settlement Act, §§ 4(a)(1), 6(c), 107 Stat. 1123.

[12] White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, § 6(a)-(b), 100 Stat. 61, 65 (1986).

jurisdiction, including by legislating with respect to federal sovereign immunity. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 581-82 (1934). Before 1946, when it created the Indian Claims Commission, Congress enacted 142 special jurisdictional acts concerning Tribal claims. Cohen Handbook, *supra*, § 5.06[2]. These special jurisdictional acts addressed, among other things, federal sovereign immunity. *See id.* After 1946, Congress has continued to enact Tribe-specific jurisdictional acts. *See, e.g.*, Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944. In sum, the field of Indian affairs reveals a longstanding history of Congress exercising its broad authority over jurisdiction and federal sovereign immunity on a Tribe-specific basis.

Thus, the Gun Lake Act is far from unprecedented.

B. The Gun Lake Act Is A Tribe-Specific Lands Act That Makes New Law.

The Gun Lake Act is but one more example in this long lineage of Tribe-specific statutes that bring clarity and certainty to the ownership status of Indian lands. Building upon its trust relationship with the Gun Lake Tribe, Congress enacted new law designating the Bradley Property as trust property and withdrawing subject matter jurisdiction over challenges to that designation. In so doing, Congress responded to this Court's invitation to address disputes such as the ongoing dispute over the Property.

With Section 2(a) of the Gun Lake Act, Congress made new law by taking the Bradley Property into

trust by statute. Section 2(a) "reaffirm[s]" the status of the Property "as trust land," thus "ratif[ying] and confirm[ing]" the Secretary's administrative decision. Gun Lake Act § 2(a), 128 Stat. 1913. The Secretary of the Interior takes land into trust based upon a variety of well-defined statutory criteria in the Indian Reorganization Act. In 2005, the Secretary took the Bradley Property into trust based upon those criteria, including a determination that the Gun Lake Tribe was "under federal jurisdiction" within the meaning of 25 U.S.C. §§ 5108 & 5129 (formerly 25 U.S.C. §§ 465 & 479). Four years later, this Court interpreted the meaning of those statutory provisions in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Citing *Carcieri*, the Petitioner has argued the Secretary lacked authority to take the Property into trust. *See Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 & n.6 (D.D.C. 2009), *rev'd on other grounds*, *Patchak I*, 567 U.S. 209. With the Gun Lake Act, Congress mooted that argument by confirming the trust status of the Bradley Property, consistent with its authority to take land into trust directly for Indian Nations and much as it has done with countless other Indian lands over the past 150 years. Section 2(a) of the Act thus made new law designating the Bradley Property as trust land without regard to the extent of the Secretary's delegated authority under 25 U.S.C. § 5108.

Section 2(b) of the Gun Lake Act likewise makes new law by withdrawing federal jurisdiction over challenges to the trust designation. It provides that "an action . . . relating to" the Property "shall not be filed

or maintained in a Federal court and shall be promptly dismissed." Gun Lake Act § 2(b), 128 Stat. 1913. Much as it has done in myriad Indian lands settlement acts, Congress chose to conclude the Gun Lake Tribe's decade-long fight to protect its reservation. It did so by making new law.

In 2012, this Court held that the Petitioner's challenge to the Secretary's decision could proceed under the Administrative Procedure Act, 5 U.S.C. § 706, notwithstanding the Quiet Title Act, 28 U.S.C. § 2409a(a), which various lower courts had concluded barred such a challenge. *See Patchak I*, 567 U.S. at 228; *id.* at 228-29 (Sotomayor, J., dissenting) (explaining that decision "expose[d] the Government's ownership of land to costly and prolonged challenges"); Cohen Handbook, *supra*, § 15.07[1][a] n.16 (noting that "[a] number of circuit courts had previously held that such suits were barred"). The Court invited Congress to address disputes such as the Petitioner's, explaining "that [it] is for Congress to tell us, not for us to tell Congress" whether the Petitioner's challenge may proceed. *Patchak I*, 567 U.S. at 224. Following the Court's invitation, the Gun Lake Tribe "addressed [its concerns] to Congress." *Id.* at 223. Congress responded by taking the Bradley Property into trust itself and by withdrawing federal jurisdiction over challenges to the Property's status as Indian trust land.[13]

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[13] Petitioner argues that the Gun Lake Act could not have made new law because the legislative history noted that the Act would not require any textual changes to existing statutes. Both the House and the Senate Reports stated that the Act makes

Section 2(b)'s withdrawal of jurisdiction is best read as a reinstatement of federal sovereign immunity. In *Patchak I*, this Court held that the APA waived sovereign immunity for the Petitioner's claim. 567 U.S. at 221. This Court went on, however, to recognize that Congress could, and "perhaps . . . should," reinstate sovereign immunity. *Id.* at 224. Congress did so in Section 2(b), providing that *any* action relating to the Bradley Property—including but not limited to the Petitioner's suit—"shall not be filed or maintained" in federal court. Gun Lake Act § 2(b), 128 Stat. 1913. To vindicate this restored sovereign immunity, Section 2(b) directs that any action challenging the federal trust property "shall be promptly dismissed," *id.*, notwithstanding the APA's provision that suits against the United States "shall not be dismissed," 5 U.S.C. § 702. Section 2(b) is thus best read to restore the sovereign immunity that the APA had waived. *See* H.R. Rep. No. 113-590, at 2 (explaining that the Gun Lake Act provides a "broad grant of immunity").

The Gun Lake Act thus represents an exercise of Congress's authority to enact Tribe-specific lands acts that take land into trust and settle ongoing disputes by limiting the jurisdiction of the Article III courts. In

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"no changes in existing law." H.R. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). Read in context, this statement means only that—no textual changes to existing statutes were required—as it refers to "subsection 12 of rule XXVI of the Standing Rules of the Senate," which requires a committee report to identify any textual changes to existing statutes that a bill might require. S.R. Rep. No. 113-194, at 4. But Congress may—and did—change the law without amending an existing statute.

the context of the federal government's relationship with Indian Nations, the Gun Lake Act is not unusual.

II. The Gun Lake Act Does Not Usurp Article III Judicial Power Or Violate The Separation Of Powers.

The Gun Lake Act is not constitutionally suspect simply because it addresses an ongoing dispute about a particular parcel of land. The Act violates neither Article III nor the separation of powers.

Amici recognize that Congress's authority to legislate with respect to pending cases, including by withdrawing jurisdiction, is not unlimited. For example, *Klein*, 80 U.S. at 128, held that Congress violated Article III and the separation of powers when it directed the Supreme Court to apply settled law in an outcome-determinative way. The Petitioner and his *amici* argue that the Gun Lake Act violates *Klein*. Each of their arguments fails, and for the same reason: The Gun Lake Act does not tell the courts how they must apply settled law, but rather makes new law for the federal courts to apply, which Congress undoubtedly can do.

A. Nothing In Article III Prevents Congress From Making New Law To Resolve Land Disputes Through Tribe-Specific Lands Acts.

The long history of case-specific legislation in the Indian Affairs arena proves that *Klein* does not stand for the broad proposition that the Petitioner advances. The Petitioner argues that *Klein* forbids Congress from making new law that directs a federal court promptly to dismiss a pending case without modifying "generally applicable substantive or procedural laws." Pet'r Br. 11. That is not what *Klein* held. Instead, *Klein* rested upon two holdings, neither of which is implicated by the Gun Lake Act.

Klein arose out of Civil War and Reconstruction era legislation concerning property seized by the Union forces during the War. Klein was the executor of the estate of Wilson, who had shipped cotton for confederates during the War, and received a full presidential pardon after taking a loyalty oath. Klein sought to recover the proceeds of the sale of Wilson's cotton.

While Klein's case was pending on appeal, the Supreme Court decided in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), that an individual who, like Wilson, had taken a loyalty oath and received a presidential pardon, would be entitled to the proceeds of sale under an 1863 Act. In 1870, Congress responded to *Padelford* by enacting a statute that withdrew jurisdiction over claims to recover seized property

where the claimant relied upon a presidential pardon. The statute directed courts to construe a presidential pardon as proof that an individual had given aid and comfort to the Confederacy. *See* Act of July 12, 1870, ch. 251, 16 Stat. 230, 235. And it withdrew jurisdiction once the courts had reached that determination on the merits: "on proof of such pardon and acceptance, . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." *Id.* As for appellate jurisdiction, the Act provided that "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Id.*

The *Klein* Court held that the 1870 Act violated Article III and the separation of powers in two ways. First, by stripping jurisdiction over claims concerning seized property *only* when a court had found on the merits that those claims rested upon a presidential pardon, Congress forbade the Court to "give the effect to evidence which, in its own judgment, such evidence should have." 80 U.S. at 147. This "passed the limit which separates the legislative from the judicial power." *Id.* Second, Congress had transgressed the separation of powers by "impairing the effect of a [presidential] pardon." *Id.*; *see also United States v. Sioux Nation*, 448 U.S. 371, 405 (1980) (discussing *Klein*'s reasons for holding 1870 Act unconstitutional).

The Article III line drawn by *Klein* thus is not crossed by particularized legislative action withdrawing jurisdiction. And this Court recognized as much in *Bank Markazi*, 136 S. Ct. at 1327. Congress

may, for example, enact particularized legislation that applies to ongoing litigation concerning specific forests, a single bridge, or a single memorial site. *See id.* at 1326, 1328 (citing *Robertson*, 503 U.S. at 434-35, 438-39, *Wheeling Bridge*, 59 U.S. at 430-32, and *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001)). With reason. Statutes that govern the management of specific properties are commonplace—and by necessity particularized. *See id.* at 1327 (explaining that petitioner's argument rested on "flawed . . . assumption that legislation must be generally applicable").

Thus, *Bank Markazi* upheld Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012 because the Act "direct[ed] courts to apply a new legal standard to undisputed fact" by rendering specific property of the Central Bank of Iran available to satisfy judgments. *Bank Markazi*, 136 S. Ct. at 1325 (upholding 22 U.S.C. § 8772). In so doing, the Court recognized that "laws that govern[] one or a very small number of specific subjects" are not necessarily unconstitutional. *Id.* at 1328. That is particularly true, this Court reasoned, when those laws address government-to-government relationships. Section 8772 was an "exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." *Id.*

The Gun Lake Act is similarly constitutional. Section 2(a) is Congress's new mandate that the Bradley Property be held in trust, regardless of the

scope of the Secretary of Interior's authority under the Indian Reorganization Act, 25 U.S.C. § 5108, or any other statute. Gun Lake Act § 2(a), 128 Stat. 1913. Section 2(b) also changes the law by withdrawing jurisdiction over challenges to that trust designation. *Id.* § 2(b). Like Section 8772 of the Iran Threat Reduction and Syria Human Rights Act, the Gun Lake Acts governs a specific subject—in this case, a specific parcel of property—but is not unconstitutional on that basis alone. And like Section 8772, the Gun Lake Act addresses government-to-government relationships in a sphere, Indian Affairs, where the "controlling role of the political branches is both necessary and proper."[14] *Bank Markazi*, 136 S. Ct. at 1328. Congress has long had authority to enact rational measures to implement its trust responsibility to Indian Nations. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Nor does the withdrawal of jurisdiction offend the separation of powers. Even beyond being a straightforward exercise of its Indian Affairs power, the Gun Lake Act is far from the first instance where Congress has required the federal courts to withdraw jurisdiction over a pending case. Congress has "on

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[14] Congress may choose to implement the United States' responsibilities under international law through Tribe-specific lands acts. *See generally* U.N. Decl. on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 art. 28(1) (2007) ("Indigenous peoples have the right to redress, by means that can include restitution . . . for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.").

occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court." *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962). In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), this Court held that Congress had validly withdrawn federal jurisdiction over an appeal from the Court of Claims by repealing the law upon which the Court of Claims had based its judgment and providing that "'no judgment heretofore rendered in pursuance of said act shall be paid.'" *Id.* at 64-65 (emphasis omitted). And in *Ex parte McCardle*, 74 U.S. at 514, this Court dismissed a case pending on appeal after Congress amended the law to withdraw jurisdiction over a class of cases, including McCardle's. Simple withdrawal of jurisdiction over a pending case does not pose the *Klein* separation of powers problem, because it does not intrude upon an Article III court's weighing of the merits.

B. The Gun Lake Act Does Not Violate *Klein*'s Prohibition Of Congressional Direction Of The Result In A Pending Case

1. The Petitioner's *amici* do not quarrel with *Bank Markazi*'s holding that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases" without violating Article III or the separation of powers. 136 S. Ct. at 1325; *see Amicus* Br. 5. Nor do the *amici* dispute that Congress may achieve specific results in pending cases

concerning particular parcels of land, including by precluding judicial review. *See Amicus* Br. 11, 21 n.9. Finally, the *amici* do not argue that Congress lacks broad authority over federal jurisdiction. *See Amicus* Br. 10.

Instead, the Petitioner's *amici* argue that the Gun Lake Act, to the extent it makes new law, does not make it in the right way. The rule they propose, in other words, is not simply that *Klein* prohibits Congress from directing results without changing the law. *See Amicus* Br. 11. They argue that Congress violates the separation of powers if it makes new law withdrawing jurisdiction while also specifying that federal courts should "promptly" "dismiss[]" suits that fall within the new jurisdictional rule. *Id.* at 21. The core of their argument is that the Gun Lake Act violates this prohibition because it required the dismissal of the Petitioner's action. But the Gun Lake Act applies to any action concerning the Bradley Property. And *Klein* does not prohibit Congress from making new law that requires prompt dismissal of pending actions.

2. *Klein* does not prohibit Congress from altering the ownership status of a parcel of land in a way that moots a judicial decree. On the contrary, *Klein* took pains to distinguish *Wheeling Bridge*, 59 U.S. 421, in which Congress had declared that two bridges were federal postal roads and lawful, notwithstanding the Court's earlier holding that the Wheeling Bridge was an unlawful impediment to navigation, *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54

U.S. (13 How.) 518 (1852). After Congress passed this property-specific legislation, the Court applied the new statute, which precluded enforcement of its earlier judgment. *Klein* reconciled its holding with *Wheeling Bridge*, explaining that "the court [in *Wheeling Bridge*] was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. at 146-47. The new law made no intrusion into judicial law-determination or fact-finding. As the Petitioner's *amici* note, the "critical aspect" of *Wheeling Bridge* was that Congress "had permanently, and for all legal purposes, altered the underlying legal status of the bridge." *Amicus* Br. 9 n.6.

The Gun Lake Act accomplishes the same end. Section 2(a) permanently alters the ownership status of the Bradley Property. Quite apart from any otherwise applicable statutory constraints on the Secretary's decision to take land into trust, the Gun Lake Act declares the Property to be Indian trust land. And this congressional determination and affirmation of the Property's trust status is new law.

3. Nor does *Klein* prohibit Congress from eliminating the legal basis for the Petitioner's suit. Congress similarly eliminated the legal basis for pending lawsuits when it enacted the Northwest Timber Compromise, which resolved a dispute concerning the adequacy of the Bureau of Land Management's ("BLM") consideration of the environmental impacts of permitting timber harvesting in thirteen national forests in Oregon and Washington. *See Robertson*, 503 U.S. at 432-36 (1992) (reviewing Northwest Timber

Compromise, § 318, Pub. L. No. 101-121, 103 Stat. 701, 745 (1989)). Identifying the three pending lawsuits by name and docket number, Congress provided that its own consideration of the environmental impacts satisfied the statutory requirements that applied to the BLM. *Id.* at 434-35. In *Robertson*, this Court upheld that statutory compromise. *Id.* at 438. Congress had "directed . . . a change in law, not specific results under old law," and thus had not violated *Klein*. *Id.* at 439. By "effectively modifying the provisions at issue" in the pending cases, Congress had eliminated the basis for the plaintiffs' administrative law challenge. *Id.* at 440.

The Gun Lake Act similarly eliminates the basis for the Petitioner's complaint about the Secretary of Interior's compliance with federal statutory law. And the Act changes the law not only for the Petitioner's suit, but also for *any* "action . . . relating" to the Bradley Property. Gun Lake Act § 2(b), 128 Stat. 1913. That is constitutional even under *amici*'s reading of *Robertson*. *See Amicus* Br. 11 ("[A]lthough the compromise had the effect of eliminating the legal basis for the plaintiffs' suit [in *Robertson*], the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise.").

Like the Northwest Timber Compromise, the Gun Lake Act explicitly withdraws federal jurisdiction while also eliminating the legal basis for an administrative law challenge. *See Robertson*, 503 U.S. at 435 n.2 (noting that Section 318(b)(6)(A) of the Northwest Timber

Compromise withdrew jurisdiction with respect to standards adopted in subsections (b)(3) and (b)(5)). And there are other examples where Congress has eliminated the legal basis for suit while withdrawing federal jurisdiction.

In 2001, for instance, Congress enacted Public Law No. 107-11, 115 Stat. 19 (2001), which mirrors the Gun Lake Act. In a case cited with approval by this Court, the D.C. Circuit upheld this statute. *See Bank Markazi*, 136 S. Ct. at 1328 (citing *Save Our Mall*, 269 F.3d at 1097, *cert. denied*, 537 U.S. 813 (2002)). Public Law No. 107-11 first provided that construction of a World War II memorial on the National Mall would be approved, *see Save Our Mall*, 269 F.3d at 1094, just as Section 2(a) of the Gun Lake Act approves the trust designation of the Bradley Property. And the statute then withdrew jurisdiction over a pending administrative law challenge to the memorial designation, stating that the designation "shall not be subject to judicial review." *Id.* Similarly, Sections 2(a) and 2(b) of the Gun Lake Act apply this belt-and-suspenders approach, declaring the substantive law, and then avoiding litigation over the decision with respect to the property by withdrawing jurisdiction over all pending and future cases relating to that property. Just as Public Law No. 107-11 passed constitutional muster, *see id.* at 1097, so too does the Gun Lake Act.

4. The Petitioner's *amici* do not dispute that Congress can make new law withdrawing federal jurisdiction over a pending case. *Amicus* Br. 20-21.

But, they argue, a constitutional problem is created when Congress includes the phrase "shall be promptly dismissed" as part of the jurisdictional provision. *See id.* at 20.

Section 2(b) of the Gun Lake Act states that any action "relating to the [Bradley] Property shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Act § 2(b), 128 Stat. 1913. *Amici* seem to suggest that the first half of this statutory phrase—"shall not be filed or maintained in a Federal court"—poses no constitutional problem. *See Amicus Br.* 20-21. Nor, they imply, would it violate *Klein* for Congress to withdraw jurisdiction by providing that a pending action "shall not be subject to judicial review," as Congress did when it approved the World War II memorial on the National Mall. *See id.* at 21 n.9 (attempting to distinguish *Save Our Mall*, 269 F.3d at 1092, from this case). Thus, their argument against Section 2(b) of the Gun Lake Act—as well as the Petitioner's argument—depends entirely upon isolating the phrase "shall be promptly dismissed" from the rest of the statute. *See id.* at 21; Pet'r Br. 11-12.

But Section 2(b) is not unconstitutional simply because Congress included a phrase specifying the necessary consequences of a withdrawal of jurisdiction. The Petitioner and his *amici* would read the phrase "shall not be filed or maintained in a Federal court" out of Section 2(b), as if Section 2(b) contained a naked command that the federal courts shall dismiss any action. Which it does not. Rather, read as a whole,

Section 2(b) provides that if a court finds that an action before it brings a challenge to the trust status of the Bradley Property, then it must withhold federal jurisdiction and therefore promptly dismiss the action. Thus, Section 2(b) does not purport to declare the law in place of the courts; rather—like any jurisdiction-removing provision—it simply withdraws the authority of the courts to declare the law. *See Ex parte McCardle*, 74 U.S. at 514 ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").[15]

In short, Section 2(b) of the Gun Lake Act is a far cry from the statutory provisions struck down in *Klein*. The *Klein* statute provided that "on proof of [a presidential] pardon and acceptance, . . . the jurisdiction of the court shall cease, and the court shall forthwith dismiss the suit of such claimant." Act of July 12, 1870, ch. 251, 16 Stat. at 235. This statute directed the federal courts to make a determination on the merits and weigh the facts to determine "proof"—that a claimant had accepted a presidential pardon—

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[15] The Petitioner is correct that "the Court has repeatedly confirmed that the judicial power cannot be shared with another branch of government." Pet'r Br. 13. As much as that is true, it is beside the point. The Court has repeatedly confirmed that the Judiciary can act only in cases and controversies over which it has jurisdiction. This basic rule was stated in *Ex parte McCardle*: "The first question necessarily is that of jurisdiction," and if a statute validly "takes away [the Court's] jurisdiction . . . , it is useless, if not improper, to enter into any discussion of other questions." 74 U.S. at 512.

rather than a threshold jurisdictional determination that a particular action related to a particular parcel of land. And the *Klein* statute further directed that a federal court must give its merits determination precisely the opposite effect than it would have had under already-existing law. *See generally Padelford*, 76 U.S. at 543. By contrast, the Gun Lake Act accepts this Court's invitation to reinstate sovereign immunity. *See* Resp. Br. 19.

Thus, in *Klein*, the jurisdictional withdrawal depended upon the merits finding, and directly undermined this Court's earlier ruling on the consequences of such a merits determination. The Gun Lake Act, by contrast, does not direct the federal courts to withdraw jurisdiction based on a merits determination, nor does it direct the opposite result from what would apply under settled law. To the contrary, wholly apart from the merits of any particular lawsuit, Section 2(b) provides that any action "relating to the [Bradley] Property shall not be filed or maintained and shall be promptly dismissed."

5. Even if the text alone does not, the canon of constitutional avoidance compels reading Section 2(b) as withdrawing federal jurisdiction without directing a result under settled law. Even if Section 2(b) were ambiguous, it would be "possible" to interpret it as "amend[ing] applicable law" and thus to avoid any question of its constitutionality under *Klein*. *See Robertson*, 503 U.S. at 441 (internal quotation marks omitted).

The Petitioner's *amici* imply that separation-of-powers values would be sacrificed if this Court were to hold the Gun Lake Act constitutional. Yet none of the important values that they advance are implicated here. The separation of powers does protect an individual litigant from a legislative majority that would seek to decide his case alone. *See Amicus* Br. 12-13. But that is not this case. Section 2(a) of the Act takes land into trust, thus altering its legal status with respect to all non-owners, not just the Petitioner. And Section 2(b) directs that *any* action concerning the Bradley Property—not just the Petitioner's—"shall not be filed or maintained."[16] Gun Lake Act § 2(b), 128 Stat. 1913.

Moreover, the separation of powers also protects Congress's authority to take land into trust and to settle ongoing Indian lands disputes, a function vital to restoring Indian Nations' land base from the losses suffered due to generations of adverse federal policies.

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[16] The Petitioner argues that Section 2(b) violates Article III because it precludes the federal courts from addressing unresolved merits questions arising from Section 2(a). Pet'r Br. 20. It is telling, however, that the Petitioner's *amici* do not press an Article III objection on this basis—likely because Article III does not so limit Congress's authority to withdraw jurisdiction. In all events, federal courts always have jurisdiction to address their own jurisdiction to review agency action where, as here, Congress has withdrawn it. *Cf. Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 673-74 (1986). Against this backdrop, Section 2(b) leaves standing the federal courts' jurisdiction to address their own jurisdiction by deciding whether an action falls within the scope of Section 2(b)'s withdrawal of judicial review. And that is all Article III requires.

For more than 150 years, Congress has enacted Tribe-specific lands acts to settle disputes, and this Court has recognized the political branches' authority to negotiate the resolution of government-to-government Indian Affairs questions. Contrary to the suggestion of the Petitioner's *amici*, *see* Br. 15, Congress was not evading responsibility by enacting the Gun Lake Act. Instead, it was fulfilling its trust responsibility to Indian Nations using a statutory tool that it has used countless times before.

C. The Gun Lake Act Does Not Prescribe An Unconstitutional Rule Of Decision Or Deprive The Petitioner Of Vested Rights.

The Gun Lake Act does not pose the threat to individual constitutional rights that the Petitioner suggests. Though the Petitioner implies his individual rights have been violated, Pet'r Br. 26, this is not a case in which Congress has ordered the federal courts to apply an unconstitutional rule of decision or to deprive an individual of vested rights. *Klein* held that Congress could not order a federal court to deny the constitutional effect of a presidential pardon. *See* 80 U.S. at 147 ("The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."). In this way, "the *Klein* judgment is adequately supported by . . . the entirely plausible understanding that the rule of decision whose application Congress directed would have required the courts to abridge the President's pardon power." Richard H. Fallon, Jr. et al.,

Hart & Wechsler's The Federal Courts and the Federal System 425 (7th ed. 2015). The Gun Lake Act, by contrast, does not interfere with any constitutional power reserved to the President, but rather moots the Petitioner's APA challenge to the Secretary's decision to take the Bradley Property into trust. In this case, Congress has not required the federal courts to apply a rule of decision that directly encroaches upon another constitutionally-protected power, like the pardon power, or the judicial power to declare the law.

Nor is this a case in which Congress has decided among competing claims of vested property rights. It may be that Article III limits Congress's authority to target a pending case involving competing claims of ownership by directing the federal courts to favor one party's evidence of title over another's. *See Bank Markazi*, 136 S. Ct. at 1329 (Roberts, C.J., dissenting). When *Klein* was decided, the concept of vested rights "was a dominant feature of general constitutional law," though it "has largely fallen from our federal constitutional discourse" today. Edward A. Hartnett, *Congress Clears its Throat*, 22 Const. Comment. 553, 575 (2005). In *Klein*, this Court suggested that Wilson's property rights vested when he took the oath of loyalty. *See* 80 U.S. at 142 (explaining that "restoration of the proceeds became the absolute right of the persons pardoned"); Hartnett, *supra*, at 574.

Whatever *Klein*'s relevance for vested property rights, however, this case does not present that question. The Petitioner does not claim to be the rightful owner of the Bradley Property. *See Patchak I*,

567 U.S. at 220 (explaining that Petitioner "wants a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it"). This is not a case in which Congress has stripped an individual of vested property rights by directing the federal courts to apply settled law in an outcome-determinative way. Rather, through the Gun Lake Act, Congress responded to an invitation from this Court to decide whether, in the interests of finality, suits related to the Bradley Property should proceed. The Gun Lake Act neither undermines judicial independence nor encroaches upon constitutional rights. Instead, it is a standard exercise of Congress's plenary authority over Indian Affairs, and reflects a constructive dialogue between Congress and this Court.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 16-498

IN THE

Supreme Court of the United States

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE,
SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici listed in the Appendix are law professors who teach and write in the fields of constitutional law and federal jurisdiction, with particular attention to the separation of powers between the political branches and the judiciary. *Amici* come together in this case out of a shared belief that the decision below, *see* JA 24,[2] is in direct and irreconcilable tension with core separation-of-powers principles, including those articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and that reinforcement of those principles is even more important after *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

SUMMARY OF ARGUMENT

As all eight Justices in *Bank Markazi* agreed, *Klein* has stood—and stands today—as a vital bulwark of judicial independence vis-à-vis the political branches. And although the majority and the dissent in *Bank Markazi* disagreed over the precise scope of the *Klein* rule, the Court was unanimous that, at a minimum, "Congress could not enact a statute directing that, in

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[1] The parties have each consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] References to the Joint Appendix are in the form "JA 1."

'Smith v. Jones,' 'Smith wins.'" 136 S. Ct. at 1323 n.17; *see also id.* at 1334–35 (Roberts, C.J., dissenting).

That invalid legislative exercise of judicial power is exactly what the statute at issue here—the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014)—attempts. Not only does the Gun Lake Act effectively direct a specific result in a pending suit (*after* this Court ruled that the suit should go forward, *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012)) without amending substantive law, but, like the statute that this Court struck down in *Klein*, it further dictates to courts that the suit at issue "*shall* be promptly dismissed." *Id.* § 2(b), 128 Stat. at 1913 (emphasis added); *see also* Act of July 12, 1870, § 1, 16 Stat. 230, 235 ("[I]n all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, . . . the Supreme Court shall, on appeal, have no further jurisdiction of the cause, *and shall dismiss the same* for want of jurisdiction." (emphasis added)).

As *Bank Markazi* reflects, disagreement persists among courts and commentators (including *amici*) concerning the contemporary doctrinal contours and theoretical underpinnings of *Klein*. But there is also widespread agreement about certain core principles—principles that the Gun Lake Act violates. "[H]owever difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line." *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J.,

dissenting). And if the Court of Appeals is correct that the Gun Lake Act falls on the constitutional side of that line, then it really will be the case that, "[h]ereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases." *Id.* at 1338.

This Court "cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Stern v. Marshall*, 564 U.S. 462, 503 (2011); *see also id.* at 502–03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."). However modest an incursion of Article III the Gun Lake Act may appear to be, and however discrete the implications of the specific dispute presented here are, holding that Congress has the constitutional authority to instruct that pending suits "shall be dismissed" would compromise the spirit and letter of *Klein*—and seriously jeopardize the independence of the federal courts going forward. Instead, this Court should reaffirm such a foundational and fundamental principle of judicial power, and reverse the decision below.

ARGUMENT

I. An Act of Congress Violates the Separation of Powers When It Compels a Specific Judicial Outcome Without Amending Substantive Law.

This Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), has long provoked debate among Federal Courts scholars, who have offered a wide range of diverse—and, at times, conflicting—

interpretations of its meaning. The academic give-and-take aside, there has generally been widespread agreement that, whatever else *Klein*'s language and holding may entail, it stands at a minimum for the proposition that Congress may not direct the result in a pending case without amending the underlying law.[3]

This Court's recent decision in *Bank Markazi* reflects both the confusion over *Klein*'s contours and the consensus over its core. Thus, even in rejecting the claim that 22 U.S.C. § 8772 violated *Klein*, Justice Ginsburg's majority opinion acknowledged the structural significance of the *Klein* rule—and the corollary that "Congress, no doubt, may not usurp a court's power to interpret and apply the law to the [circumstances] before it, for [t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." 136 S. Ct. at 1323 (alterations in original; internal quotation marks and citations omitted).

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[3] *See, e.g.*, William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1079, 1088 (1999); Evan H. Caminker, Schiavo *and* Klein, 22 Const. Comment. 529, 533 (2005); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718-21 (1995); Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Sec. L. & Pol'y 251, 252–53 (2011); Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69-70 (2011); Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 Wash. & Lee L. Rev. (forthcoming 2017).

Thus, the nub of the dispute in this case is whether the Gun Lake Act simply amends existing law in a manner that does (and may) affect pending cases, or whether it exercises judicial, rather than legislative, power. A proper understanding of *Klein*, and of the deeper separation-of-powers principles it protects, compels the conclusion that the Gun Lake Act falls into the latter category, and is therefore unconstitutional.

A. *Klein* is best understood to forbid Congress from directing the result in a pending case without amending the underlying law.

During the Civil War, Congress enacted the Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863), which provided an opportunity for persons whose property was seized in the rebellious states to obtain the proceeds from sale of that property if they could prove that they had not "given any aid and comfort" to the rebellion. Shortly thereafter, President Abraham Lincoln issued a presidential proclamation offering a full pardon—including restoration of rights in seized property—to persons who had been engaged in the rebellion if they took a new loyalty oath.

Some years later, in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that a person taking such an oath and receiving a pardon would be deemed legally loyal, and therefore entitled to restoration of property under the Abandoned and Captured Property Act. The Reconstruction Congress, generally skeptical of President Andrew Johnson's conciliatory policy toward the conquered South, responded by enacting a statute barring the use of a pardon to prove loyalty, taking a pardon to be conclusive

proof that the claimant *had* been disloyal in fact, and instructing the federal courts to dismiss claims predicated on a pardon for want of jurisdiction.[4] As the statute provided,

> in all cases where judgment shall have been heretofore rendered in the [C]ourt of [C]laims in favor of any claimant on any other proof of loyalty than such as [the proviso requires], the Supreme Court shall, on appeal, have no further jurisdiction of the cause, *and shall dismiss the same for want of jurisdiction.*

Act of July 12, 1870, § 1, 16 Stat. 230, 235 (emphasis added).

This Court struck down that statute in *Klein*. The Court held that Congress's action was not a valid "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" of the Supreme Court. *Klein*, 80 U.S. (13 Wall.) at 146. Even though Congress may have broad power to restrict this Court's appellate jurisdiction.[5] Chief Justice Chase wrote that Congress may not "prescribe rules of decision to the Judicial

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[4] *See generally* Wasserman, *supra* note 2, at 59–63; Amanda L. Tyler, *The Story of* Klein: *The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories* 106 (Vicki C. Jackson & Judith Resnik eds., 2009).

[5] The Court had decided *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), only three years earlier.

Department . . . in cases pending before it." *Id.* Under the statute, "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely opposite." *Id.* at 147. By so requiring, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* Finally, the Court also suggested that by impairing the effect of a presidential pardon, the law "infring[ed] the constitutional power of the Executive." *Id.*

It may be tempting to read *Klein* simply as a case about the pardon power, holding that Congress may not impair the full effect of a presidential pardon any more than it may restrict the President's other exclusive powers. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that Congress may not impair the President's exclusive power to recognize foreign nations). Indeed, in its brief in opposition to certiorari, the Federal Respondents offered precisely this argument, suggesting that "[t]he problem in *Klein* was that *other* provisions of the statute mandated a rule of decision for the federal courts." U.S. Br. Opp. 10. As the Federal Respondents summarized *Klein*, "[t]he statute required courts to treat a Presidential pardon as proof of disloyalty and provided that whenever a judgment of the Court of Claims was based on a pardon, the Supreme Court would lose jurisdiction over the appeal." *Id.*; *see also id.* ("Unlike the statute in *Klein*, Section 2(b) of the Gun Lake Act eliminates a category of cases . . . from the jurisdiction of the federal courts, regardless of what those cases are about or what the court in any pending case may have decided.").

But Chief Justice Chase plainly raised the pardon issue in *Klein* only *after* identifying a standalone violation of Article III: Having found that the statute "passed the limit which separates the legislative from the judicial power," he observed that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." *Klein*, 80 U.S. (13 Wall.) at 147 (emphasis added); *see also Bank Markazi*, 136 S. Ct. at 1334 n.2 (Roberts, C.J., dissenting) (describing "*Klein*'s unmistakable indication that the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns"); Caminker, *supra* note 3, at 533 (observing that "the structure and language of the Court's opinion make clear that the two separation of powers principles discussed in *Klein* operate in the disjunctive").

Indeed, as *Bank Markazi* instructs, *see* 136 S. Ct. at 1325–26 (internal quotation marks omitted), *Klein*'s language about "prescrib[ing] rules of decision" must be read in concert with numerous subsequent decisions holding that Congress may amend the law governing pending litigation, and that courts must ordinarily give such amendments retroactive effect if Congress so intends. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272–73 (1994); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

Klein itself recognized as much by distinguishing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59

U.S. (18 How.) 421 (1856). In May of 1852, the Court had held that the Wheeling Bridge was an impediment to navigation and ordered it removed. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852). In August of the same year, however, Congress passed an act declaring that the bridge (as well as another bridge in Ohio) was a lawful structure and designating both as federal post roads. In the wake of this new statute, the Court acknowledged that its prior decree could no longer be executed, and it rejected any argument that the new law interfered with the judicial power. *See* 59 U.S. (18 How.) at 431–32, 435–36.[6]

The *Klein* Court found this decision perfectly consistent with its own holding. "No arbitrary rule of decision was prescribed in that case," Chief Justice Chase wrote, "but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 146–47. In *Klein* itself, by contrast, "no new circumstances have been created by legislation," *id.* at 147, all the more so in light of Congress's mandate that all matters implicating the statute "*shall* be dismissed"—language that

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[6] The *Wheeling Bridge* Court also emphasized that Congress's statute altered only the Court's prospective decree directing removal of the bridge. The Court suggested that the case would have come out differently had there been a claim for damages, *Wheeling Bridge*, 59 U.S. (18 How.) at 431, and in fact the Court did enforce the portion of its initial decree requiring the defendants to pay costs, *id.* at 436. But we think the critical aspect of *Wheeling Bridge* was that Congress had permanently, and for all legal purposes, altered the underlying legal status of the bridge.

contemplated no further judicial analysis. Put another way, the constitutional infirmity in the statute before the Court was not that it purported to withdraw the Supreme Court's appellate jurisdiction, but that it proceeded to direct the Court to dismiss all pending appeals *without* the opportunity to adjudicate its jurisdiction. The Court still had the power to review the constitutionality of that latter mandate as part of its jurisdiction to determine its jurisdiction. But if Congress *could* so direct the Court, then Congress could deprive the Court of jurisdiction to determine its jurisdiction by enacting effectively unreviewable jurisdiction-stripping provisions.

To illustrate the narrowness of *Klein*'s core principle when read in conjunction with Congress's acknowledged power to change the underlying law, consider *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). There, the Court was asked to review the validity of the Northwest Timber Compromise, a federal statute modifying timber harvesting restrictions in forests home to the endangered spotted owl. The statute was enacted in response to ongoing litigation challenging whether the Bureau of Land Management had adequately considered the impact of permitted logging on the owl. As part of a compromise restricting logging in some areas and permitting it in others, section 318 of the statute designated particular portions of federal land, including that concerned in the ongoing litigation, as open to timber sales, and it mandated that management of the land pursuant to the law's new provisions would be "adequate consideration for the purpose of meeting the statutory requirements that are

the basis for" the ongoing litigation, which it referred to by name and docket number. *See id.* at 433–35.

The Ninth Circuit had held that section 318 violated *Klein* because it directed the resolution of a pending case without amending the underlying law, but this Court reversed. Assuming that the Court of Appeals' reading of *Klein* had been correct, the Court nonetheless found that the statute "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. That conclusion, on *Robertson*'s facts, seems perfectly in line with *Klein*'s distinction of the *Wheeling Bridge* case: Congress's intervention exempted the specific provisions of the timber compromise from the general requirement that agencies consider environmental impacts.

And although the compromise had the effect of eliminating the legal basis for the plaintiffs' suit, the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise. Hence, "[t]o the extent that [the statute] affected the adjudication of the [pending] cases, it did so by effectively modifying the provisions at issue in those cases," *id.* at 440, leaving to *courts* the quintessentially judicial work of *applying* those substantive modifications to pending and future cases. Thus, *Robertson* maintained *Klein*'s central distinction between directing law application and amending the underlying law, and it illustrates that Congress may still achieve quite specific results when doing the latter, and those results may profoundly affect pending litigation.

B. Precluding Congress from directing results without changing the law serves important separation of powers values.

This Court's decision in *Robertson* did not expressly adopt the view that *Klein*'s prohibition turns on the difference between directing the outcome of a case and amending the underlying law; it assumed that the Court of Appeals had been correct in so reading *Klein* but found that the rule had not been violated. *See Robertson*, 503 U.S. at 441. But there is broad agreement among Federal Courts scholars that *Klein* must mean at least this much,[7] and *Bank Markazi* appears to confirm this view. *See* 136 S. Ct. at 1326. Whatever else, if anything, *Klein* may forbid, its prohibition on directing results without amending the law serves critical values of judicial independence and integrity.

At least two sets of separation of powers values are salient in this context. The first concerns the protection of litigants from an adjudicative process dominated by majoritarian politics. When Congress amends the underlying law, it necessarily deals with the subject of legislation in a more general way than when it simply directs the outcome of a pending case. Congress may be able to foresee the impact of the law on the present litigation, but it must also contemplate that, having been amended generally, the law may govern other unforeseen cases in the future. Even in *Robertson*, the specific mention of the pending cases in the statute was merely illustrative; the act's provisions nonetheless governed any other litigation that might arise

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[7] *See* sources cited in note 3, *supra*.

concerning the affected timber sales. *See* 503 U.S. at 440 ("The reference to [specific cases] . . . served only to identify the five 'statutory requirements that are the basis for' those cases . . . . To the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifiying the provisions at issue in those cases.").

The Founders were concerned that the early state legislatures had too often taken judicial matters into their own hands. *See* Federalist No. 48, at 310–12 (Isaac Kramnick ed., 1987) (1788) (James Madison); *see also Plaut*, 514 U.S. at 221–22 (collecting sources); *INS v. Chadha*, 462 U.S. 919, 960–62 (1983) (Powell, J., concurring in the judgment) (same). James Madison thus had this abuse, among others, in mind when he wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47, *supra*, at 303 (James Madison).

To that end, our Constitution requires the concurrence of multiple institutional actors before individuals may be deprived of liberty or property. *See, e.g., United States v. Brown*, 381 U.S. 437, 443 (1965) ("For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."). This principle forces legislators, at least to some extent, to enact general laws behind a veil of ignorance, knowing that those laws may

well be applied to their own constituents or supporters. *See, e.g., Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (explaining how the requirement that legislatures may not control to whom the laws will be applied prevents abuse of power). And it assures individuals that when the law is actually applied to them, it will be in a judicial forum with all the procedural protections that such a forum affords. *See Chadha*, 462 U.S. at 966 (Powell, J., concurring in the judgment) (noting the lack of procedural safeguards when legislatures directly effect deprivations of rights); *cf. Hurtado v. California*, 110 U.S. 516, 535–36 (1884) ("[A] special rule for a particular person or a particular case" cannot properly be described as a "law.").

The second set of values involves the independence and integrity of the courts themselves. The judiciary's power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is the power to interpret and apply the applicable procedural and substantive law according to the court's own best judgment. *Changing* the applicable law does not intrude on that judgment.

But telling a court what outcome to reach, what legal conclusions to draw, or how to apply the existing law to facts *without* leaving room for exercises of judicial power compromises the independence and integrity of the courts. Moreover, this threat to judicial integrity is also a threat to the mechanisms of accountability that ordinarily discipline the democratic process. Congress does not have the same obligation of principled decisionmaking that courts do. But Congress should not be able to evade democratic responsibility for the

choices it makes by misrepresenting those choices as judicial decrees. As Henry Hart explained over a half-century ago,

> It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the former instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its deception, the harmful consequences to that judicial integrity are far more significant.

Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953); *see also* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 Geo. L.J. 2525, 2529 (1998) (arguing that *Klein* is directed toward preventing the "co-optation of the judiciary's national authority").

As Professor Hart suggested, the risk is that Congress will seek to evade responsibility for its laws by contriving that they be announced as legal judgments. That undermines not only the integrity of the courts' decisional processes but also the operation of democratic accountability on the legislative side.

This Court has affirmed the institutional independence and integrity of the Article III courts in ringing terms in cases like *Plaut*, 514 U.S. at 239–40, and *Stern*, 564 U.S. at 503. But it does little good to prevent Congress from reopening final judicial judgments or from reassigning decisionmaking responsibility to non-Article III courts if Congress may simply tell the Article III judiciary—directly or indirectly—how to decide cases in the first place. *Cf. New York v. United States*, 505 U.S. 144 (1992) (holding that the Constitution prohibits Congress from dictating the content of *state* policy as a matter of federal law).

That is why scholars have interpreted *Klein* as insisting that "[t]he judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees." Sager, *supra*, at 2529; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. Rev. 437, 438–39 (2006) (reading *Klein* to forbid Congress from enlisting the judiciary in deceiving the electorate as to the actual state of the law). In other words, if the judiciary interprets the preexisting law to require a particular outcome, it may not be required to reach the opposite conclusion unless that preexisting substantive law is duly changed.

C. *Klein*'s core holding survived *Bank Markazi*.

Although many of the *amici* (and two Justices) argued in *Bank Markazi* that 22 U.S.C. § 8772 therefore violated the separation-of-powers principle at *Klein*'s core, a majority of this Court disagreed. But rather than entombing the *Klein* rule, *Bank Markazi* necessarily sharpened it—upholding section 8772 only because (1) "it directs courts to apply a new legal standard to undisputed facts," 136 S. Ct. at 1325; (2) "laws that govern[] one or a very small number of specific subjects" are not per se unconstitutional, *id.* at 1326; and (3) "§ 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper," *id.* at 1328.

Properly understood, *Bank Markazi* leaves intact the analytical core of the *Klein* rule: An Act of Congress that does *not* "direct[] courts to apply a new legal standard to undisputed facts," but merely directs courts to rule in a particular manner on a pending case, runs afoul of the separation of powers. As *Klein* teaches, such a measure represents an exercise by the political branches of judicial—rather than legislative—power.

II. The Gun Lake Act Violates *Klein*.

Notwithstanding the above analysis, the Court of Appeals in this case—even with the benefit of *Bank Markazi*—concluded that the Gun Lake Act is consistent with *Klein*. As Judge Wilkins wrote for the panel,

> we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

JA 34–35 (citations omitted).

In other words, the Court of Appeals' conclusion that the Gun Lake Act permissibly "directs courts to apply a new legal standard to undisputed facts" turns on two separate determinations: That section 2(a) altered the substantive law to be applied by courts to Petitioner's suit; and that section 2(b) did so, as well. Neither of these arguments, properly understood, withstands scrutiny.

First, with regard to section 2(a), it is hardly clear that Congress intended to *alter* substantive law, as opposed to simply *confirming* it. *See* Pet. 21–24. But even assuming *arguendo* that section 2(a) *did* change the substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow that the change would be implemented by the *courts*.

As the majority stressed in upholding 22 U.S.C. § 8772 in *Bank Markazi*, the factual determinations required by the statute were not "mere fig leaves," for "it [was] quite possible that the [c]ourt could have found that defendants raised a triable issue as to whether the [b]locked [a]ssets were owned by Iran, or that [other parties] ha[d] some form of beneficial or equitable interest." 136 S. Ct. at 1325 (alterations in original; citations omitted).[8]

Thanks to section 2(b) of the Gun Lake Act, however, the "new law" purportedly created by section 2(a) would benefit from no similar judicial construction; as soon as a court determines that an action "relat[es] to the land" described in section 2(a), it "shall be promptly dismissed." Given that there is no question that this case qualifies as such a suit, *see Patchak*, 567 U.S. at 227–28, the net effect of the Gun Lake Act is, as the proceedings below demonstrate, to compel a specific judicial result *without* any meaningful opportunity for legal or factual analysis of how any "new" law bears upon the merits. Put another way, section 2(b) prevents courts from asking the critical separation-of-powers question that

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[8] Another way of giving content to the distinction between "amending" substantive law and "confirming" it is to treat the latter class as encompassing only those statutes that set government policy or achieve a governmental objective in a way that does more than simply *benefit* the government as a party in a pending case, as is true under the Gun Lake Act. *See* Zoldan, *supra* note 2 (arguing for this understanding of *Klein*).

Klein and its progeny require, *i.e.*, whether section 2(a) actually changes the substantive law.

Second, it hardly saves the Court of Appeals' analysis to assert that, instead of (or in addition to) section 2(a), section 2(b) of the Gun Lake Act constitutionally changes the law. Whether or not section 2(b) is properly characterized as "jurisdictional," *see* Pet. at 21 n.7, there can be no doubt that it confers no latitude or discretion upon the federal courts; on the contrary, it commands them to take a specific action—"dismissal"—in all cases related to the Bradley Property. Contrary to the Court of Appeals' analysis, section 2(b) does not "provide[] a new legal standard we are obliged to apply," JA 34; it dictates a specific legal *result* without any room for judicial construction other than the threshold determination that the case at bar falls within the statute's mandate of dismissal.

Rather than squarely defend the Court of Appeals' analysis on this point, the Federal Respondents frame the matter slightly differently, arguing that "Congress unquestionably has the power to alter the jurisdiction of the federal courts, *which is what required dismissal* of petitioners' suit." U.S. Br. Opp. 12 (emphasis added). In other words, in the Federal Respondents' view, the aspect of the Gun Lake Act that mandated dismissal of Petitioner's suit was the withdrawal of jurisdiction, not the statutory command that the suit "shall be promptly dismissed."

Of course, it may well be that, exercising the judicial power, a federal court would have concluded that the first clause of section 2(b) does indeed require dismissal of petitioners' suit, and is constitutional insofar as it so

provides. But section 2(b) does not *allow* such an exercise of judicial power; rather, "what required dismissal of petitioners' suit" in this case was an exercise of legislative, not judicial, power—to wit, section 2(b)'s command that suits like this one "shall be promptly dismissed."[9] As noted above, *see ante* at 9–10, the effect of such a command, if upheld, is to deprive the courts of jurisdiction to determine their jurisdiction.

Setting the secondary issue of pardons aside, on the Court of Appeals' logic, the *Klein* statute itself would have been upheld. Like the Gun Lake Act, the statute at issue in *Klein* had two principal clauses—the substantive clause, which mandated that pardons be taken as conclusive proof of *dis*loyalty under the Abandoned and Captured Property Act; and the jurisdictional clause, which formally stripped the federal courts of jurisdiction over all claims under the

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[9] Contrast this language, for example, with the statute at issue in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). That statute, on which the Federal Respondents rely, was "enacted while a case was pending in district court and provided that administrative decisions approving the location of the World War II Memorial in Washington D.C., 'shall not be subject to judicial review.'" U.S. Br. Opp. 12 (quoting *Nat'l Coalition*, 269 F.3d at 1094). Unlike both the Gun Lake Act and the statute at issue in *Klein*, however, that statute *only* removed federal jurisdiction, and did not additionally command the federal courts to dismiss all cases potentially subject to that proviso. It may have led to the same *result*, but only after a constitutionally significant exercise of judicial, rather than legislative, power.

Abandoned and Captured Property Act turning on pardons—and then, like the Gun Lake Act, commanded the dismissal of any such pending cases.

By the D.C. Circuit's reasoning, the "change in law" central to the Court of Appeals' analysis was the precise "change in law" that this Court held to be unconstitutional in *Klein*. Unless *Klein* stands *only* for what has rightly been described as its "alternative" holding—that Congress cannot use its power over federal jurisdiction to negate the effect of powers vested exclusively in the President, *but see ante* at 7—then the Gun Lake Act must fall.

Finally, although the Gun Lake Act—and the ongoing dispute over the Bradley Property—may seem limited in scope to a specific set of facts, *see, e.g.*, U.S. Br. Opp. 14, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture," *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," this Court "cannot overlook the intrusion." *Stern*, 564 U.S. at 503 (internal quotation marks omitted). After all, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

* * *

Other cases may present harder questions with regard to the line between proper exercises of legislative power and improper exercises of judicial power. But the imperative for judicial reaffirmation of

the *Klein* principle could not be stronger, and the Gun Lake Act could not be a better candidate for such a ruling.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

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RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-498

In the
Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PROFESSOR EDWARD A. HARTNETT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Edward A. Hartnett is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall University School of Law. Professor Hartnett teaches and writes in the fields of constitutional law and federal courts, and has an interest in the sound development of the law in those fields. He has also written on, and has a particular interest in, the proper interpretation of a decision at the center of this case: *United States v. Klein*, 80 U.S. 128 (1872).

SUMMARY OF ARGUMENT

Two Terms ago, this Court observed that *United States v. Klein* "has been called 'a deeply puzzling decision.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2538 (1998)). That was putting it mildly.[2]

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* states that this brief has been filed with the written consent of all parties. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1193 (calling *Klein* "confusing"); Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 323 (7th ed. 2015) (*Klein* "raises more questions than it answers"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 Geo. L.J. 1, 34 (2002) (*Klein* is "sufficiently impenetrable that calling it opaque is a compliment"); Meltzer, *supra*,

Amicus submitted a brief in *Bank Markazi* asking the Court to clarify that *Klein* stands for the principle—and only the principle—that Congress cannot prescribe an unconstitutional rule of decision. Although the Court agreed that *Klein* stands at least for that principle, it was able to resolve *Bank Markazi* without deciding whether *Klein* also stands for something more. *See* 136 S. Ct. at 1324 n.19.

Petitioner and his *amici* now argue—as a number of the same *amici* previously argued in *Bank Markazi*—that *Klein* does stand for something more, and that the statute at issue in this case is therefore unconstitutional. *Amicus* submits this brief to reiterate why that interpretation over-reads *Klein*. Properly interpreted, nothing in *Klein* (or *Bank Markazi*) casts any doubt on the constitutionality of the statute at issue in this case.

ARGUMENT

I. *United States v. Klein* is correctly understood to prohibit statutes that prescribe unconstitutional rules of decision.

Although *Klein* is enigmatic, there is a broad scholarly consensus that it *at least* held that Congress lacks authority to decree a result that would violate a principle of constitutional law.[3] This Court

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at 2549 ("Much that is said in the opinion is exaggerated if not dead wrong . . . .").

[3] *See, e.g.*, Fallon et al., *supra*, at 298 ("[*Klein*] may be best read as resting on distinctive substantive grounds—that the measure required courts to render decisions that conflicted with the President's power to pardon."); Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in Federal Courts Stories 87, 109

agreed with that consensus in *Bank Markazi*, concluding that "commentators have rightly read *Klein* to have at least this contemporary significance: Congress 'may not exercise its authority, including its power to regulate federal jurisdiction, in a way that requires a federal court to act unconstitutionally.'" 136 S. Ct. at 1324 n.19 (quoting Meltzer, *supra*, at 2549) (brackets omitted).

The more controversial question is whether *Klein* has any additional "contemporary significance." *Amicus* submits that it does not. The principle that Congress cannot prescribe an unconstitutional rule of decision fully explains the result in *Klein*, and is thus the only principle that truly represents its holding.

In contrast, the interpretation of *Klein* proposed by petitioner and his *amici*—that Congress cannot direct the outcome of a pending case unless it purports to amend the underlying law (Pet. Br. 16-17; Fed. Courts Scholars *Amici* Br. 5-11 ("*Amici* Br.")))—does not explain the result in *Klein*. Congress did purport to amend the underlying law in the statute at issue in *Klein*, and the outcome thus cannot have turned on the principle advocated by petitioner and his *amici*. And while that principle is perfectly sound

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(Vicki C. Jackson & Judith Resnik eds., 2009) (*Klein* holds that Congress cannot "compel the courts to enforce an unconstitutional law or . . . be 'instrumental to that end'" (quoting 80 U.S. at 148)); Edward A. Hartnett, *Congress Clears Its Throat*, 22 Const. Comment. 553, 580 (2005) ("[Klein] holds that Congress lacks the authority to prescribe unconstitutional rules of decision." (emphasis omitted)); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 586 (2003) ("Perhaps the best understanding of *Klein*'s rule of judicial independence is that Congress cannot legislate so as to require courts to act unconstitutionally . . . .").

in the abstract, ascribing that principle to *Klein* would be pernicious because it would erroneously suggest that statutes purporting to amend the underlying law to the same extent as the statute in *Klein* are unconstitutional.

A. *Klein* held that Congress lacks authority to prescribe unconstitutional rules of decision.

1. *Klein* arose from a claim for compensation in the wake of the Civil War. Union officers had seized and sold Victor Wilson's cotton after the fall of Vicksburg.[4] By statute, the owner of seized property could recover the proceeds of its sale in the Court of Claims "on proof . . . of his ownership . . . and that he ha[d] never given any aid or comfort to the present rebellion." Act of Mar. 12, 1863, ch. 120, § 3, 12 Stat. 820, 820 ("1863 statute"). John Klein, the administrator of Wilson's estate, sought such relief.[5]

Wilson had been a surety on the bonds of two Confederate officers.[6] In *United States v. Padelford*, 76 U.S. 531 (1870), this Court held that such a suretyship constituted "aid and comfort to the rebellion within the meaning of" the 1863 statute. *Id.* at 539. Both Wilson and Padelford, however, had been pardoned under President Lincoln's proclamation of December 8, 1863. *Klein*, 80 U.S. at 131-32. Upon taking an oath of allegiance, that proclamation granted rebels "a full pardon . . . with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened." Proclamation No. 11, 13 Stat. 737, 737 (Dec. 8, 1863).

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[4] Young, *supra*, at 1192, 1198.

[5] Young, *supra*, at 1192.

[6] *Id.* at 1199.

Padelford held that the recipient of such a pardon—at least one who took the required oath prior to the seizure of his property—"was purged of whatever offence against the laws of the United States he had committed . . . and relieved from any penalty which he might have incurred." 76 U.S. at 543.

Consistent with *Padelford*, the Court of Claims held that Wilson's estate was entitled to recover. While the government's appeal to this Court was pending, Congress attempted to change the effect of a presidential pardon through a rider to an appropriations bill. *Klein*, 80 U.S. at 143. The rider made a pardon inadmissible to prove loyalty, made acceptance of a pardon (without protesting innocence) conclusive evidence of *disloyalty*, and provided that the Supreme Court, in cases in which the Court of Claims had already ruled in the claimant's favor based on a pardon, "shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 ("1870 statute").

2. Invoking the 1870 statute, the government moved to remand *Klein* to the Court of Claims with instructions to dismiss. 80 U.S. at 134. This Court rejected that request, held that the statute was unconstitutional, and affirmed the judgment of the Court of Claims. *Id.* at 145-48.

Chief Justice Chase's opinion for the Court first concluded that, as a statutory matter, the seizure of rebel property did not divest the owners of their title to the proceeds from that property. 80 U.S at 138. Instead, the government held the property as "trustee" for any owners who made the showing of loyalty required by the 1863 statute. *Id. Padelford* had already held that a pardon was sufficient evidence of

loyalty to satisfy the statute, and *Klein* held that the effect of Wilson's pardon was thus to give him an "absolute right" to the "restoration of the proceeds" from his property. *Id.* at 142.

The Court then held that the 1870 statute, which ostensibly nullified Wilson's right to recover by requiring the Court to dismiss, was unconstitutional. It explained that the statute withdrew the Court's jurisdiction "as a means to an end," and that its "great and controlling purpose [was] to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. The statute was not, therefore, "an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* at 146. The Court also explained that it could not dismiss the case "without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* As a result, "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

The Court next concluded that "[t]he rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." 80 U.S. at 147. "[T]he legislature cannot," the Court explained, "change the effect of . . . a pardon any more than the executive can change a law," but "this [was] attempted by the provision under consideration." *Id.* at 148.

In a dissent joined by Justice Bradley, Justice Miller agreed with the Court that the 1870 statute was "unconstitutional, so far as it attempt[ed] to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President." 80 U.S. at

148 (Miller, J., dissenting). He nevertheless disagreed with the decision to affirm. Justice Miller disputed that Wilson had maintained title to his property after its seizure, and that he could therefore recover the proceeds by virtue of his subsequent pardon. *See id.* at 148-49. In the dissent's view, title had passed to the government at the time of seizure, and the pardon could not "restore that which ha[d] thus completely passed away." *Id.* at 150.

3. The principle that Congress lacks the authority to require the courts to apply an unconstitutional rule of decision—that "Congress may not compel the courts to speak a constitutional untruth"[7]—explains the result in *Klein*. The Court's holding that the 1870 statute was unconstitutional is adequately supported by the reasoning that (1) Congress lacks authority to prescribe an unconstitutional rule of decision, and (2) Congress had attempted to prescribe an unconstitutional rule of decision by instructing the Court to dismiss the case and deny recovery to Wilson's estate, a result that would have conflicted with the constitutional effect of Wilson's pardon.[8]

B. *Klein* need not be understood to adopt any broader principle.

Petitioner's *amici* do not dispute that *Klein* held that Congress has no power to instruct the courts to apply an unconstitutional rule of decision. Instead, they argue that *Klein* must also have held something

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[7] Meltzer, *supra*, at 2540.

[8] *See, e.g.*, Fallon et al., *supra*, at 325 ("the Klein judgment is adequately supported by . . . the entirely plausible understanding that the rule of decision whose application Congress directed would have required the courts to abridge the President's pardon power").

more. That is because the opinion stated that the statute was "'*also* liable to just exception as impairing the effect of a pardon.'" *Amici* Br. 8 (quoting 80 U.S. at 147). That ruling, petitioner's *amici* assert, came after the Court had already identified "a standalone violation of Article III" and held that the statute "'passed the limit which separates the legislative from the judicial power.'" *Id.* (quoting 80 U.S. at 147). Petitioner's *amici* argue that it is necessary to give meaning to that holding as well.

This argument undoubtedly has force.[9] Ultimately, however, the principle that Congress has no authority to prescribe unconstitutional rules of decision explains *both* of the seemingly alternative holdings of *Klein*. That is because, properly understood, both holdings rested on the principle that Congress cannot prescribe an unconstitutional rule of decision. The Court issued alternative holdings only because it found two different reasons *why* the 1870 statute prescribed an unconstitutional rule of decision.

As all agree, one reason was that the statute impaired the effect of a pardon and therefore violated the President's constitutional authority. But the Court also found that the 1870 statute prescribed an unconstitutional rule of decision—and thus "passed the limit which separates the legislative from the judicial power" (80 U.S. at 147)—because it violated

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[9] *See Bank Markazi*, 136 S. Ct. at 1334 n.2 (Roberts, C.J., dissenting) (concluding that *Klein*'s ruling about "the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns").

the independent constitutional principle, extant at the time, that vested rights could not be destroyed.[10]

To understand why, it is helpful to consider the disagreement between the majority and the dissent. For the dissent, there was a critical distinction between a case such as *Padelford*, in which the rebel took the oath and was pardoned prior to the seizure of his property, and *Klein*, in which the rebel took the oath after the seizure of his property. Justice Miller's view was that, in *Padelford*, because "the possession or title of property remain[ed] in the party, the pardon or the amnesty remit[ted] all right in the government to forfeit or confiscate it." *Klein*, 80 U.S. at 150 (Miller, J., dissenting). But he concluded that, in *Klein*, because the property had "already been seized and sold, and the proceeds paid into the treasury," and because that meant (in his view) that title had already passed to the government, it followed that "the pardon [did] not and [could not] restore that which ha[d] thus completely passed away." *Id.*

The majority disagreed that title to Wilson's cotton had ever passed to the government. It emphasized at the outset that Wilson's cotton was defined by statute to be "captured and abandoned property," and that this statutory category of property was "known only in the recent war" and had no precedent in history. 80 U.S. at 136, 138. Unlike the dissent, the majority concluded that title to this "peculiar" form of property was not "divested absolutely out of

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[10] *See* Hartnett, *supra*, at 574-80; *cf.* Erwin Chemerinsky, Federal Jurisdiction § 3.2, at 1934 (6th ed. 2012) (explaining that the statute at issue in *Klein* could be understood both to infringe the pardon power and "unconstitutionally deprive[] [a person of] property without just compensation or due process," and thus to destroy a "vested right").

the original owners" when it was seized. *Id.* Rather, the property went "into the treasury without change of ownership," and the "government constituted itself the trustee for those . . . entitled to the proceeds" under the 1863 statute. *Id.* at 138.

From this perspective, once a property owner like Wilson took the required oath, "the pardon and its connected promises took full effect," and "[t]he restoration of the proceeds became the absolute right of the person[] pardoned." 80 U.S. at 142. Indeed, refusing to restore the proceeds as promised in the presidential proclamation would be a "breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom." *Id.*

This last reference was to the Emancipation Proclamation (Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863)), and it helps to clarify that the pardon played two distinct roles in the majority opinion in *Klein*. One role was to provide the basis for concluding that the 1870 statute "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." 80 U.S. at 147. The second role was to provide a mechanism by which a right was vested. In this second respect, there was nothing particularly distinctive about a pardon. Other legal instruments, such as the Emancipation Proclamation or a simple deed, also created vested rights.

The language of vested rights has largely fallen out of our federal constitutional discourse. But it was a dominant feature of the general constitutional law that federal courts developed in diversity cases dur-

ing the nineteenth century.[11] For example, in *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court ruled that Georgia's attempt to rescind a land grant was unconstitutional, explaining: "[I]f an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, [and] those conveyances have vested legal estate." *Id.* at 135. As Chancellor Kent put it, "[a] retrospective statute, affecting and changing vested rights, is very generally considered, in this country as founded on unconstitutional principles, and consequently inoperative and void."[12]

With this background in mind, it becomes evident that *Klein* held that the 1870 statute prescribed a result that was unconstitutional not only because it impaired the effect of a pardon, but also because it abrogated vested rights. Under more modern doctrine, this second violation might also be understood in due process terms, and *Klein* could be viewed as holding that the statute violated the Fifth Amendment because it purported to deprive a person of property without due process of law.[13] However it is framed, this second violation explains the Court's reasoning that Congress had "passed the limit which separates the legislative from the judicial power" by "prescrib[ing] a rule for the decision of a cause in a

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[11] *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 Tul. L. Rev. 1263, 1264-66, 1268-82 (2000).

[12] 1 James Kent, Commentaries on American Law 455 (O.W. Holmes, Jr. ed., 12th ed. 1873).

[13] *See, e.g.*, Chemerinsky, *supra* at 194 (describing this second aspect of *Klein* in terms of both due process and vested rights); Young, *supra*, at 1213-14 & n.136 (describing the vested rights problem in due process terms).

particular way." 80 U.S. at 146-47. As this Court explained in *Bank Markazi*, this language cannot be interpreted literally to mean that Congress can *never* prescribe a rule of decision for a pending case. 136 S. Ct. at 1324. Rather, the problem in *Klein* was a narrower one: Congress had prescribed an "*arbitrary* rule of decision" (80 U.S. at 146 (emphasis added)), namely, a rule of decision that violated the general constitutional law principle of vested rights.

The "vested rights" approach is further illustrated by the contrast that *Klein* drew with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). *Klein* explained that *Wheeling Bridge* did not involve a statute that prescribed an "arbitrary rule of decision." 80 U.S. at 146. In *Wheeling Bridge*, the Court employed traditional vested rights language to explain that, when a "private right[] [has] passed into judgment the right becomes absolute." 59 U.S. at 431. The Court held, however, that the rights at stake in *Wheeling Bridge* were public rights, and for that reason, Congress *could* prescribe a rule of decision that contradicted the Court's previous decision concerning those rights. *Id.*; *see also Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1171 (10th Cir. 2004) (McConnell, J.) (explaining the distinction between *Klein* and *Wheeling Bridge* in terms of the difference between public and private rights). Because the statute in *Wheeling Bridge* did not destroy any vested private rights, *Klein* concluded that the rule of decision in *Wheeling Bridge* was not an "arbitrary" one.

The vested rights approach also helps to solve another puzzle posed by *Klein*. The case involved a claim against the United States, and some rationale is needed to justify affirming a judgment against the United States despite its sovereign immunity and a

stated congressional policy to deny recovery.[14] The vested rights view provides that rationale: Because the claimant had a vested property right, and because Congress constituted the United States as trustee of the property, it seems to follow that Congress could not (or at least could not be understood to) divest that vested right by denying a forum in which to assert it.[15] This understanding is consistent with *Klein*'s statement that it is "not entirely accurate" to say that "the right to sue the government in the Court of Claims is a matter of favor," and that "[i]t is as much the duty of the government as of individuals to fulfil its obligations." 80 U.S. at 144.

Viewed in this light, *Klein* is similar to a case decided a few years earlier, *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864). In *Gelpcke*, the city of Dubuque had issued municipal bonds based on then-current understandings of Iowa law. The Iowa Supreme Court subsequently overruled its earlier decisions and held that Dubuque had no authority to issue the bonds. *See id.* at 205. This Court nevertheless held that the bondholders must be paid because the state-court decision could "have no effect upon the past." *Id.* at 206. Under "the law of this court," the destruction of rights acquired under a contract, valid when made, "would be as unjust as to hold that the rights acquired under a statute may be lost by its repeal." *Id.* Although federal courts ordinarily followed state-court rules of decision regarding state law, this Court declared that it "shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07.

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[14] *See* Meltzer, *supra*, at 2539 n.12; Hartnett, *supra*, at 573.

[15] *See* Hartnett, *supra*, at 577.

Thus, in both *Klein* and *Gelpcke*, this Court refused to be bound by rules of decision, whether prescribed by Congress (*Klein*) or the state courts (*Gelpcke*), that violated the principle of general constitutional law that vested rights could not be destroyed. And, in *Klein*, this violation was an alternative reason why the 1870 statute prescribed an unconstitutional rule of decision.

Ultimately, therefore, this Court's reasoning in *Klein* took the following form: (1) Congress lacks the authority to bind courts to apply an unconstitutional rule of decision; and (2) the 1870 statute improperly sought to do just that (a) because it violated the general constitutional law principle of vested rights (or more modern principles of due process), and (b) because it also impaired the effect of a pardon. *Klein* thus issued alternative holdings only as to the reason why the statute sought to prescribe an unconstitutional rule of decision. The opinion need not be interpreted to adopt any other principle concerning Congress's authority to prescribe rules of decision.

C. The understandings of *Klein* advanced by petitioner and his *amici* are flawed.

Petitioner and his *amici* nevertheless urge the Court to adopt a broader interpretation of *Klein*. They argue that *Klein* stands for the principle that Congress cannot direct the outcome of a pending case unless it at least purports to "amend[] existing laws." Pet. Br. 16; *see also Amici* Br. 4.[16] This interpretation

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[16] This appears to be the position of petitioner and his *amici*, even though it is not exactly what they say. For example, *amici* state that, under *Klein*, "Congress may not direct the result in a pending case without amending the underlying law." *Amici* Br. 4. But if the problem in *Klein* was only that Congress did

would, on separation-of-powers grounds, limit Congress's authority to prescribe rules of decision in pending cases, even if those rules of decision would not violate any independent constitutional principle.

The principle advocated by petitioner and his *amici*, however, cannot explain the result in *Klein*. Congress *did* purport to amend the underlying law in the 1870 statute. Thus, *Klein*'s ruling that the 1870 statute was unconstitutional cannot have rested on the principle that purporting to amend the law is a necessary condition for a statute to be valid.

On its face, the 1870 statute purported to amend the law in numerous respects. For example:

- It provided that "no pardon or amnesty granted by the President . . . , shall be admissible in evidence . . . in support of any claim against the United States."
- It provided that the proof of loyalty required by prior statutes must be made "irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion."
- It provided that, in cases in which the Court of Claims had already entered

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not "amend the underlying law," that problem would be fully explained by the no-unconstitutional-rules-of-decision approach advocated here. Because Congress has no authority to prescribe an unconstitutional rule of decision, Congress *could not* have amended the law through the 1870 statute, and therefore necessarily failed to do so. We understand petitioner and his *amici*, however, to be making a different, broader point—that the statute in *Klein* was unconstitutional not only because it failed to amend the law due to a lack of congressional authority, but also because it did not even *purport to* amend the law.

> judgment in favor of a claimant "on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning" of the prior statutes, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."
>
> - It provided that, if a person accepted a pardon for participating in the rebellion without an express disclaimer of guilt, the "pardon and acceptance shall be taken and deemed . . . conclusive evidence" of disloyalty.

16 Stat. 235.

Although much of the statute employed the language of evidence, that is not itself constitutionally problematic because "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Moreover, it has long been recognized that conclusive presumptions are rules of law. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality op.) ("While § 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law.").[17] Indeed, so long as no independent constitutional bar-

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[17] *See also, e.g.*, 9 J. Wigmore, Evidence § 2492 (3d ed. 1940) (explaining that a "conclusive presumption" is, in fact, a "rule of substantive law").

rier is crossed, a rule of law is no less valid because it defines words (such as "loyalty") in unusual ways.[18]

In arguing that the statute in *Klein* did not purport to amend existing law, petitioner's *amici* rely on the passage in *Klein* in which the Court observed that the statute in *Wheeling Bridge* had created "new circumstances," whereas "no new circumstances" were created by the 1870 statute. 80 U.S. at 147; *see Amici* Br. 9. But that was a statement about the legal *effect* of the statute, not what it purported to do. The 1870 statute sought to create "new circumstances" by destroying vested rights and altering the effect of a pardon. The reason that the statute failed to create those "new circumstances" was that they were beyond Congress's authority to create. *See Bank Markazi*, 136 S. Ct. at 1324 ("The statute in *Klein* . . . attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.").

Petitioner's *amici* also rely on this Court's decision in *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). *Amici* Br. 10-11. *Robertson*, however, did not suggest that the statute in *Klein* was an example of a statute that failed to purport to amend the law, or that *Klein* was decided on that basis. Instead, as petitioner's *amici* acknowledge (*id.* at 11-12), *Robertson* assumed without deciding that *Klein* requires that the law be amended. 503 U.S. at 441. The Court proceeded to resolve the case on the ground that the

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[18] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) (rejecting the argument that "Congress' choice of statutory language can invalidate [an] enactment when its operation and effect are clearly permissible"); *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (like Humpty Dumpty, legislatures "are free to be unorthodox" in their use of language).

statute in *Robertson* did amend the law. *See id.* The Court therefore declined to reach the question whether *Klein* stands for the conclusion that petitioner's *amici* attribute to it here—namely, that the 1870 statute was unconstitutional because it did not purport to amend the law.

To be clear, *amicus* agrees with the principle that Congress cannot dictate the outcome of a pending case without amending the underlying law. Putting the point more precisely, Congress has the legislative power to amend the law—which includes the power to make new law that has a sufficiently clear application to a pending case that it effectively dictates the outcome of that case. Congress does not, in contrast, have the judicial power to render judgments in particular cases (apart from impeachment and elections), and it therefore oversteps its authority when it attempts to resolve a pending case without amending the law. *Amicus* also agrees that enforcing this boundary between the legislative and judicial powers "serves important separation of powers values." *Amici* Br. 12. Even so, respect for the other branches, as well as principles of constitutional avoidance, counsel in favor of interpreting a statute to amend the underlying law whenever fairly possible—which is what this Court did in *Robertson*. 503 U.S. at 441.

In any event, the critical point here is that the statute in *Klein* should not be understood as an *example* of a statute that did not purport to amend the underlying law. If the statute were erroneously understood in that manner, it would follow that any statute that is similar to the statute in *Klein* also does not purport to amend the law, and thus is equally unconstitutional. The danger posed by the position of petitioner and his *amici*, therefore, is that

it would lead to erroneous conclusions that statutes are invalid under *Klein*. That would give *Klein* a broader sweep than it warrants as a matter of *stare decisis*, and would give rise to unnecessary constitutional confrontations between the courts and Congress.

A counterfactual that is based on *Klein* illustrates the point. Suppose that, in 1870, Congress had been controlled by the Democrats rather than the Republicans. Suppose further that the Democrats believed, contrary to *Padelford*, that persons who had merely signed surety bonds for Confederate officers should not be treated as disloyal on that ground. If Congress had amended the law while cases brought by such persons were pending to declare that they were loyal for purposes of recovering under the 1863 statute, and that their claims should not be dismissed on the grounds of disloyalty, it is inconceivable that this Court would have found that statute unconstitutional and denied recovery. Yet petitioner and his *amici* would view this statute as having the same constitutional flaw as the statute in *Klein*.

Under a correct interpretation of *Klein*, there is no constitutional problem with this counterfactual statute because it does not prescribe an unconstitutional result. It does not attempt to force this Court to decide a case notwithstanding its view of the pardon power, destroy vested rights, or violate the Due Process Clause. This hypothetical illustrates that the true problem in *Klein* was not that the 1870 statute failed to purport to amend the law. It was instead that it purported to amend the law in a manner that prescribed an unconstitutional rule of decision.

D. *Bank Markazi* did not adopt a different understanding of *Klein*.

Nothing in *Bank Markazi* is to the contrary. As they argue here, petitioner's *amici* argued that the statute in *Bank Markazi* was unconstitutional under *Klein* because it directed the outcome of a pending case without purporting to amend the underlying law. But the Court held that the statute in *Bank Markazi* did amend the underlying law "by establishing new substantive standards." 136 S. Ct. at 1326.

The Court therefore resolved *Bank Markazi* without definitively ruling on the meaning of *Klein*. Its decision instead took the same form as its decision in *Robertson*: The Court held that, even assuming that *Klein* stands for the principle that Congress cannot direct the result of a pending case without purporting to amend the underlying law, the statute at issue was valid because it satisfied that principle. *See* 136 S. Ct. at 1326.

Indeed, petitioner's *amici* do not argue that *Bank Markazi* adopted their interpretation of *Klein*. They instead argue only that *Bank Markazi* did not rule out that interpretation. *Amici* Br. 17. That is true. But it is equally true that *Bank Markazi* did not rule out the interpretation of *Klein* advocated here. To the contrary, the Court hinted that, when push came to shove, it might ultimately agree that *Klein* stands for nothing more than the principle that Congress cannot prescribe an unconstitutional rule of decision. *See Bank Markazi*, 136 S. Ct. at 1324 n.19 (observing that "commentators have rightly read *Klein* to have at least" adopted this principle).

To be sure, as all members of the Court agreed in *Bank Markazi*, "Congress could not enact a statute

directing that, in 'Smith v. Jones,' 'Smith wins.'" 136 S. Ct. at 1323 n.17; *see id.* at 1334-35 (Roberts, C.J., dissenting). The majority reasoned that this hypothetical statute "would create no new substantive law; it would instead direct the court how preexisting law applies to particular circumstances." *Id.* at 1323 n.17. The dissent reasoned that this statute would change the law, but still would "constitute[] an exercise of judicial power" because it would be "tailored to one case" and express only a judgment "that one side in one case ought to prevail." *Id.* at 1335 (Roberts, C.J., dissenting). But whatever the reason that this statute would be invalid—and *amicus* agrees that it would be—it does not implicate *Klein*. Indeed, a statute providing only that "Smith wins" bears no resemblance to the statute in *Klein*, which purported to amend the law in several respects, and which directed dismissal for lack of jurisdiction of an entire category of cases, as opposed to directing a result on the merits in only a single pending case.

Bank Markazi therefore leaves open the conclusion that *Klein* held only that Congress lacks authority to prescribe unconstitutional rules of decision.

II. Neither *Klein* nor *Bank Markazi* casts any doubt on the constitutionality of the statute at issue in this case.

1. Properly understood, *Klein* does not suggest that the Gun Lake Act is unconstitutional. Petitioner and his *amici* do not argue that this statute prescribes an unconstitutional rule of decision. Nor could they. In providing that actions relating to the Bradley Property should be dismissed, § 2(b) of the Gun Lake Act does not even arguably deprive petitioner of a constitutionally guaranteed remedy. Petitioner does not contend, for example, that he owns

the Bradley Property and that § 2(b) therefore deprives him of any constitutionally required remedy for a taking. He instead challenges the government's acquisition of the Bradley Property based on the effect of the property's proposed use. Although Congress could authorize the federal courts to adjudicate this type of challenge, the Constitution does not require it to do so. Thus, petitioner cannot prevail under *Klein*.

2. Petitioner and his *amici* nevertheless argue that § 2(b) of the Gun Lake Act violates the separation of powers because it "decided Petitioner's case" without amending existing law. Pet. Br. 22; *see also Amici* Br. 22. That is incorrect. Section 2(b) is best understood to amend existing law by restoring the government's sovereign immunity against suits concerning the Bradley Property. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians Resp. Br. 15-26 ("Tribe Resp. Br."); Fed. Resp. Br. 23-27.

In its previous decision in this case, the Court held that the government had waived its sovereign immunity against petitioner's suit, but recognized that Congress could—and perhaps should—revisit that waiver through legislation. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 223-24 (2012). That is what Congress did in § 2(b) of the Gun Lake Act. It is true that the statute does not use the phrase "sovereign immunity." But it restores sovereign immunity by providing that actions concerning the Bradley Property "shall be promptly dismissed," Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913, 1913 (2014), thus echoing the waiver of sovereign immunity in the APA, which provides that an action that otherwise satisfies the APA's terms "shall

not be dismissed" on the ground that it is against the United States. 5 U.S.C. § 702.

Particularly because § 2(a) of the Gun Lake Act ratifies the Secretary of the Interior's action in taking the Bradley Property into trust, § 2(b) is most naturally interpreted to insulate that ratified action from APA review by selectively withdrawing the APA's otherwise general waiver of sovereign immunity. In other words, § 2(b) reflects Congress's judgment that, having ratified the Secretary's action, APA review of that action would be pointless.[19]

If Congress had amended the APA to provide that an action "other than one relating to the Bradley Property" shall not be dismissed on the ground that it is against the United States, there would be no question that Congress had validly withdrawn its

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[19] Petitioner asserts that § 2(a) of the Gun Lake Act does not amend existing law because it ratifies the Secretary's action of taking the Bradley Property into trust. Pet. Br. 19-20. But ratifying executive actions—and thereby removing uncertainty over their legality—must count as a change in law for separation of powers purposes. In other words, amending the law in order to clarify it is an exercise of legislative power, not judicial power. Petitioner's *amici*, in turn, argue that the Gun Lake Act is invalid even if § 2(a) changes the law because a change in the law is constitutionally valid only if it "would be implemented by the *courts*," and § 2(b) prevents the courts from implementing § 2(a) by requiring dismissal of any suit that might implicate § 2(a). *Amici* Br. 18-19. The Constitution, however, does not require changes in the law to be implemented by the courts. Indeed, petitioner's *amici* cite no authority for that remarkable proposition. Moreover, the courts *do* implement § 2(a) when, pursuant to § 2(b), they dismiss suits challenging the Secretary's action of taking the Bradley Property into trust. In any event, these arguments ultimately do not affect the outcome of this case because, whether or not § 2(a) changes the law, § 2(b) does so by withdrawing the government's waiver of sovereign immunity.

waiver of sovereign immunity with respect to such actions. The same conclusion would follow if Congress had included language in § 2(b) of the Gun Lake Act providing that an action concerning the Bradley Property shall be promptly dismissed "on the ground that it is against the United States." Yet these hypothetical statutes are no different in effect than the version of § 2(b) that Congress enacted. The statute should therefore be understood to amend the law by withdrawing the government's waiver of sovereign immunity against suits concerning the Bradley Property. At the very least, the Court should adopt that understanding as a matter of constitutional avoidance. *See Robertson*, 503 U.S. at 441.

3. Petitioner's *amici* do not dispute that Congress could change the law in a manner that would result in dismissal of petitioner's suit (for example, by restoring sovereign immunity or withdrawing jurisdiction). *Amici* Br. 20-21. But they argue that § 2(b) does not amend the law, and thus is unconstitutional, because it explicitly instructs courts to "dismiss" such suits, rather than allowing courts to decide whether dismissal is the correct result. *Id.*

Nothing in the Constitution, however, prohibits Congress from enacting legislation stating that a certain class of cases should be dismissed. It is true that Congress has the power to make laws, as opposed to the power to render judgments in particular cases. But the exercise of the power to make laws will frequently control the judgments that must be entered in particular cases. In those circumstances, Congress does not violate the Constitution by spelling out the consequences of the laws that it enacts. That is particularly true when Congress is making clear that the enactment applies to pending cases.

For example, there is an existing circuit split on the question of whether the Alien Tort Statute categorically forecloses corporate liability. *See Jesner v. Arab Bank, PLC*, No. 16-499. Congress could resolve that question by enacting a statute providing both that the Alien Tort Statute forecloses such liability (or not), and that actions against corporations under the Alien Tort Statute shall therefore be dismissed (or not). Congress would not transgress any constitutional limitation by enacting the latter part of such a statute and making explicit what the first part of the statute makes implicit.

By the same token, a statute that reinstates (or waives) sovereign immunity is not invalid merely because it also provides that the result of that reinstatement (or waiver) is that certain actions shall (or shall not) be dismissed. Indeed, the contrary view embraced by petitioner's *amici* would call into question the validity of the waiver of immunity in the APA itself. After all, in providing that certain actions "shall not be dismissed," 5 U.S.C. § 702, the APA confers no more "latitude or discretion upon the federal courts" than § 2(b) of the Gun Lake Act. *Amici* Br. 20. Rather, both statutes "command[] [the courts] to take a specific action" (*id.*): dismissal (in the case of § 2(b)) or non-dismissal (in the case of the APA).[20]

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[20] Petitioner's *amici* suggest that the new legal rule in § 2(b)—that courts must dismiss actions "relating to" the Bradley Property—is also too clear to be constitutionally valid. *Amici* Br. 19-20 (arguing that, because "there is no question that this case qualifies as" an action relating to the Bradley Property, § 2(b) leaves no "meaningful opportunity for legal or factual analysis" or "room for judicial construction"). But "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Bank Markazi*, 136 S. Ct.

The same is true for numerous additional statutes that provide that certain classes of cases should be dismissed, including on immunity grounds. *See* Tribe Resp. Br. 22 & n.7 (citing examples); 22 U.S.C. § 254d ("Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed.").[21] These statutes confirm that, contrary to the view of petitioner's *amici*, there is nothing unusual or inappropriate about Congress including such language in the Gun Lake Act.

Section 2(b)'s directive to dismiss suits relating to the Bradley Property therefore does not render it

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at 1325. Moreover, the application of the new legal rule in § 2(b) may be less clear in other cases. For example, suppose a Michigan citizen were injured in a car accident on the Bradley Property, and he brought an action in federal court against the Ohio contractor who constructed the road for negligently altering the grade. It is not obvious whether that action would "relat[e] to" the Bradley Property for purposes of § 2(b). In such a case, the court would need to decide to what extent § 2(b), in addition to restoring the government's sovereign immunity, withdraws jurisdiction over suits between private citizens.

[21] *See also, e.g.*, 9 U.S.C. § 4 ("the proceeding shall be dismissed"); 12 U.S.C. § 5388(a) ("any case or proceeding . . . shall be dismissed"); 17 U.S.C. § 408(f)(4) ("An action . . . shall be dismissed"); 18 U.S.C. § 3162(a)(2) ("the information or indictment shall be dismissed"); 18 U.S.C. § 5036 ("the information shall be dismissed"); 22 U.S.C. § 2702(c) ("the case shall be dismissed"); 26 U.S.C. § 6226(b)(4) ("such action shall be dismissed"); 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); 48 U.S.C. § 1506 ("such suit shall be dismissed").

unconstitutional. If reinstating immunity is a constitutional change in the law—and everyone appears to agree that it is—the statute does not become unconstitutional merely because it effectuates that reinstatement by providing that any actions within the scope of reinstatement should be dismissed.

Petitioner's *amici* resist this conclusion by arguing that, if § 2(b) made a "change in law," it would be the same "'change in law' that this Court held to be unconstitutional in *Klein*." *Amici* Br. 22; *see also id.* at 10 (arguing that the problem in *Klein* was not that the statute "purported to withdraw the Supreme Court's appellate jurisdiction," and instead that "it proceeded to direct the Court to dismiss all pending appeals"). But the problem in *Klein* was that the 1870 statute prescribed an unconstitutional rule of decision, not that it instructed courts to "dismiss." Even if the statute in *Klein* had *not* required dismissal, and instead had provided only that the federal courts lacked jurisdiction over claims that relied on a presidential pardon, the statute still would have been invalid because it still would have prescribed a rule of decision that was unconstitutional.

Petitioner's *amici* also argue that § 2(b)'s instruction to dismiss particular cases unconstitutionally "deprive[s] the courts of jurisdiction to determine their jurisdiction." *Amici* Br. 21. That begs the question. If a jurisdictional statute prescribes an unconstitutional rule of decision, a court cannot obey it. Sometimes, as in *Marbury*, that means that a court cannot exercise jurisdiction, even though the statute says that it has jurisdiction. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (refusing to exercise jurisdiction because "an act of the legislature, repugnant to the constitution," does not "bind the courts, and oblige

them to give it effect"). And sometimes, as in *Klein*, the proper remedy for the constitutional violation is for the court to exercise jurisdiction, even when the statute instructs the court to "dismiss." *See* 80 U.S. at 145-48; *see also Boumediene v. Bush*, 553 U.S. 723 (2008).[22] In other words, a court is no more required to follow an unconstitutional rule of decision framed in terms of "dismissal" than it is required to follow an unconstitutional rule of decision framed in any other terms.

Under a correct reading of *Klein*, therefore, § 2(b) is not invalid merely because it instructs courts to dismiss a particular class of cases. Instead, the dispositive question is whether the statute prescribes an unconstitutional rule of decision. The statute in *Klein* did; the statute in this case does not.

4. Finally, petitioner and his *amici* argue that the Gun Lake Act is no different from the hypothetical "Smith wins" statute addressed in *Bank Markazi*. *See* Pet. Br. 17 (arguing that the Gun Lake Act "resembles th[is] hypothetical statute"); *Amici* Br. 2 (arguing that the statute here attempts to do "exactly" the same thing as the "Smith wins" statute). That is incorrect. As explained above, under the majority's approach in *Bank Markazi*, the problem with "Smith wins" is that it "would create no new substantive law." 136 S. Ct. at 1323 n.17. Here, § 2(b) creates new substantive law by restoring the government's sovereign immunity. Moreover, under the Chief Justice's approach in *Bank Markazi*, the problem with

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[22] The remedy of exercising federal jurisdiction, in both *Klein* and *Boumediene*, can be explained on severability and statutory construction grounds. Fallon et al., *supra*, at 1203 (explaining *Boumediene*); Hartnett, *supra*, at 576 n.129 (explaining *Klein*).

"Smith wins" is that it would be "tailored to one case" and express nothing more than a judgment "that one side in one case ought to prevail." *Id.* at 1335 (Roberts, C.J., dissenting); *see also id.* at 1336 (distinguishing *Robertson* and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), because those cases did not concern statutes directed to a single case). Here, § 2(b) is not limited to a single case, and instead applies to *any* case concerning the Bradley Property. Under the approaches of both the majority and the dissent in *Bank Markazi*, therefore, § 2(b) is a valid exercise of the legislative power.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Congress of American Indians ("NCAI") submits this brief as amicus curiae in support of Respondents' position that the Court should affirm the judgment below in *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016). As the oldest and largest national organization addressing American Indian interests, NCAI currently represents more than 250 tribes and Alaska native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of Indian issues, including the federal trust-acquisition policies relevant to this suit.

Amicus is in a unique position to articulate the vital role that trust land acquisition plays in the welfare of Indian tribes and Indian communities, which provides critical context in discerning Congress' intent behind the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014) (the "Gun Lake Act"). In particular, Amicus will explain how rising concerns over the uncertainty and lack of finality that had been injected into the trust acquisition process motivated the case-by-case confirmation of trust land status in this and similar cases. Congress was, in effect, responding to this Court's invitation in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v.*

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[1] In accord with Supreme Court Rule 37.6, NCAI affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of NCAI's intention to file this amicus brief under this Rule, and consent to file was granted by all parties. Letters reflecting the parties' consent have been filed with the Clerk.

Patchak, 567 U.S. 209 (2012) ("*Patchak I*"), to step in and restore the federal government's sovereign immunity, and hence the certainty and finality in fee-to-trust transactions, necessary for tribal governments to make productive use of their trust lands, consistent with federal policies of tribal self-government and economic self-sufficiency embodied in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq*.

SUMMARY OF ARGUMENT

Land held in trust by the United States for the benefit of Indian tribes plays a critical role in tribal self-government and economic development. Trust lands support all aspects of tribal life, from the provision of government and health care services to the protection of natural resources to energy development.

Congress considered and enacted the Gun Lake Act in 2014, against the backdrop of critical developments in the trust land acquisition process. As Congress was well aware, this Court's decisions in both *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Patchak I* resulted in a wave of litigation introducing a new degree of uncertainty and lack of finality into that process. Those developments are exemplified by *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015), in which litigants used the *Carcieri* and *Patchak I* decisions as tools with which to re-open a land transfer that the government had finalized decades earlier, thereby undermining finality and repose.

When construed in this full context, the Gun Lake Act is best understood as a simple and straightforward response by Congress to this Court's invitation in *Carcieri* and *Patchak I* to restore certainty to the trust land acquisition process. In enacting the Gun Lake

Act, Congress affirmed the trust status of, and restored the sovereign immunity of the United States with respect to, one parcel of land for the Gun Lake Tribe, and it acted well within its authority in doing so. This Court therefore should affirm the judgment of the court of appeals.

ARGUMENT

I. TRUST-LAND ACQUISITIONS ARE CRITICAL TO RESTORING TRIBAL HOMELANDS AND SUPPORTING TRIBAL ECONOMIC DEVELOPMENT, SELF-GOVERNMENT, AND SELF-DETERMINATION.

A. The Purpose of IRA Section 5 Is to Restore and Protect Tribal Homelands.

1. Trust-Land Acquisitions Are Necessary to Repair the Fragmentation of Removal and Allotment Policies.

In 1934, Congress enacted the IRA, including the trust land acquisition provisions in Section 5, in an effort to reverse the deleterious effects of federal Indian policies during the previous century, which had decimated tribal land holdings and devastated tribal communities. 25 U.S.C. § 465; *see generally* General Allotment Act, ch. 119, 24 Stat. 388 (1887). "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 73-1804, at 6 (1934)).

One of the core functions of the IRA is to address the enormous loss of Indian land holdings that occurred as a result of the federal government's allotment and

assimilation policies, whereby the government allotted parcels to individual Indians and opened surplus lands for homesteading by non-Indians, thereby enabling the alienation from tribal control of lands that had been previously set aside for perpetual Indian use. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-257 (1992); Charles Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, 19-21 (1987). During the allotment era, from approximately 1887 to 1933, roughly 90 million acres of tribal land were removed from tribal occupancy and ownership through allotment. *Id.*; *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 436 n.1 (1989). In addition to the 90 million acres lost through allotment, 60 million acres of tribal land were lost through outright cession or sale to non-Indian homesteaders and corporations, bringing the total amount of alienated land to 150 million acres. *Cohen's Handbook of Federal Indian Law* § 1.04 (Nell Jessup Newton, ed., 2012) ("*Cohen*").[2]

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[2] As a result, many Indian reservations became "checkerboards" of interspersed tribal and non-tribal parcels, individual allotments became fractionalized over successive generations of Indian and non-Indian ownership, and an influx of non-Indians formed homesteads on and otherwise occupied vast areas of former tribal lands and reservations. *See generally* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 Idaho L. Rev. 519, 522-23 (2013). As then-Judge Gorsuch observed, "checkerboard jurisdiction [became] a fact of daily life throughout the West." *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016), *cert. dismissed*, 137 S. Ct. 2328 (2017).

Well before the allotment era, tribal homelands were also devastated by federal removal policies, through which the United States government pursued massive forced migrations of whole populations of Indians from their ancestral lands to remote corners of the western territories thought to be less desirable for homesteading and development. *See generally* Charles E. Cleland, *Rites of Conquest: The History and Culture of Michigan's Native Americans* ("*Rites of Conquest*"), at 199-201 (1992). There was a concerted effort during the mid-nineteenth century, for example, to remove the Pottawatomi Indian Tribes and other Indian populations based in Michigan and around the Great Lakes to areas in present-day Kansas and Oklahoma. *See* R. David Edmunds, *The Pottawatomis, Keepers of the Fire*, at 240-42 (1939); Charles E. Cleland, Michigan State University, *A Brief History of Michigan Indians*, at 24 (1975); *Rites of Conquest*, at 198-230.

As relevant to this case, not all of the Indians were successfully removed and relocated. *See* Edmunds, at 268-70, 273-75; *Rites of Conquest*, at 225 ("The number of Pottawatomi who were actually removed is unknown. Many simply hid out until the removal fervor subsided."); J.A. at 54, 161-62. Certain bands of Pottawatomi, for example, remained associated with their ancestral lands in Michigan, having managed to avoid removal, escape from forced marches, or return from exile. Edmunds, at 268-70; *Rites of Conquest*, at 224-25, 234-44.

Many of the Indians who remained in or returned to Michigan after removal were landless or scattered among small colonies or other minor landholdings. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe" or "Tribe") followed this

trajectory. The United States entered into more than a dozen treaties with the Tribe from 1795 to 1855. J.A. at 53-54. Yet, by the 1850s, as the United States pursued the wholescale removal of thousands of Pottawatomi from Michigan, the Tribe was ultimately divested of its treaty lands. J.A. at 54, 161-62. Members of the Tribe remained in Michigan after removal, occupying a diminutive parcel of land in Allegan County, Michigan, referred to as the Griswold Indian Colony and later as the Bradley Settlement. J.A. at 86. Although deprived of its broader ancestral homelands, the Tribe maintained its character, nationhood, culture, and community, clinging to this outpost in Michigan—one of the areas where the Tribe continues to exist today. J.A., at 161-62.

Thus, the trust acquisition process under the IRA is as relevant for tribes whose land holdings were decimated by removal as it is for tribes whose reservation lands were scattered and diminished through later policies of allotment and assimilation.

2. In Enacting Section 5 of the IRA, Congress Recognized the Importance of Restoring Tribal Land Bases.

Section 5 of the IRA authorizes the Secretary "in his discretion" to acquire "any interest in lands, water rights, or surface rights to lands within or without existing Indian reservations" through purchase, gift, or exchange "for the purpose of providing land for Indians." 25 U.S.C. § 465. Authorizing the federal government to take land into trust for the benefit of tribes is the cornerstone of the Act's efforts to restore and stabilize tribal land bases in order to promote tribal economic, cultural, and civic self-sufficiency. The "essential and basic features" of the IRA are "[l]and reform and in [sic] a measure home rule," 78

Cong. Rec. 11,729 (1934), with the purpose of safeguarding "security of the Indian lands," and "developing as rapidly as possible Indian use of Indian lands for self-support," *id.* at 11,730. The ultimate goal is "to make the Indians, as a group, self-supporting . . . ." *Id.* at 11,732. Despite the well-recognized need to restore tribal homelands through the trust acquisition process, in the decades since 1934, tribes have re-acquired only around 10 million of the 150 million acres of tribal lands lost before the enactment of the IRA. Opening Statement of Hon. Maria Cantwell, Chairman of the Committee on Indian Affairs, S. Hrg. 113-214, at 1-3 (Nov. 20, 2013).

The Department of Interior has recognized the "critical role" played by "the fee to trust process as a means to restore and bolster self-determination and sovereignty in Indian country." Statement of James Cason, Acting Deputy Secretary of the Interior, Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act (July 13, 2017), https://www.doi.gov/ocl/trust-land-acquisition. As explained in recent testimony by the Department:

> The benefits to tribes are twofold. First, restoration of tribal land bases reconnects fractionated interests and provides protections for important tribal cultures, traditions, and histories. Second, the connectivity that occurs when land is placed into trust enables tribes to foster economic potential. From energy development to agriculture, trust acquisitions provide tribes the flexibility to negotiate leases, create business opportuni-

> ties, and identify the best possible means to use and sell available natural resources.

Id.

Trust-land acquisitions support the full panoply of tribal life.[3] As explained by the former Assistant Secretary for Indian Affairs, tribes use the acquisitions to sustain all aspects of self-government and social continuity:

> [T]he largest number of land into trust applications is for agriculture. The second most is for infrastructure, such as health care facilities, schools and police stations and those sorts of things. Third, for economic development, but not including gaming . . . . gaming is really the small exception that ends up having a great deal of public attention, but it does not represent the heartland of land into trust in any way.

Statement of Hon. Kevin Washburn, Assistant Secretary, Indian Affairs, U.S. Department of the Interior, *Committee on Indian Affairs*, S. Hrg. 113-214, at 9 (Nov. 20, 2013).

3. Land Is Taken into Trust Under IRA Section 5 Through a Deliberative Process, with Substantial Opportunity for Input by States and Interested Stakeholders.

The Department of Interior's implementing regulations for the fee-to-trust process provide the standards that guide trust-land acquisitions. *See* 25 C.F.R. Part 151. The process begins when a tribe files a fee-

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[3] *See* discussion in Section I.C, *infra*.

to-trust application with the Bureau of Indian Affairs ("BIA"). The application must include a description of the land, the intended use, and the reason the applicant is requesting the land be placed into trust. Dep't of Interior, Bureau of Indian Affairs, *Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)*, Version IV (revised June 28, 2016). Depending on whether the land is on-reservation or off-reservation, different standards apply. *See* 25 C.F.R. § 151.10 (on-reservation acquisitions); 25 C.F.R. § 151.11 (off-reservation acquisitions).

The Department of the Interior recognizes that trust acquisitions may raise concerns by local and state governments, and therefore specifically solicits comments from such bodies regarding the impact trust acquisitions may have on their tax bases and jurisdiction. *See* 25 C.F.R. §§ 151.10, 151.11. In addition, discretionary trust-land acquisitions require review under the National Environmental Policy Act ("NEPA"), which provides a further opportunity for stakeholders to provide input in the fee-to-trust process. *See, e.g.*, 40 C.F.R. § 1501.7(1) (requiring agencies to "invite the participation of affected Federal, State, and local agencies . . . and other interested persons"); Dep't of Interior, Bureau of Indian Affairs, *Fee-to-Trust Handbook*, at 18 ("NEPA compliance for every discretionary fee-to-trust transaction must be documented").

The Secretary bases the decision to acquire land into trust after carefully evaluating, on the record, the criteria set forth in the regulations, including (among others) the "need of the...tribe for additional land," the "purposes for which the land will be used," the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and

any "[j]urisdictional problems and potential conflicts of land use . . . ." *See* 25 C.F.R. § 151.10(b), (c), (e), (f); § 151.11(a). All final fee-to-trust decisions are ultimately subject to judicial review under the Administrative Procedure Act ("APA"). *See Patchak I*, at 224.

B. Trust-Land Acquisitions Support Tribal Economic Development, Self-Government, and Self-Determination.

Tribes utilize trust land to support economic development, exercise self-government, and promote self-determination. In contrast, tribes lacking adequate land bases may struggle to fully realize these goals.

1. Trust-Land Supports Tribal Economic Development, Which Results in Improved Socioeconomic Conditions.

Indian communities remain among the most economically disadvantaged groups in the United States. In 2015, the poverty rate among American Indians and Alaska Natives was 26.6%, the highest rate of any group, compared with 14.7% among the population as a whole. *See* United States Census Bureau, *Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native Heritage Month: November 2016*, https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2016/cb26-ff22_aian.pdf.[4]

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[4] Relatedly, Indian communities suffer from some of the highest rates in the nation for unemployment, high school drop outs, alcohol and substance abuse, and domestic violence. *See* Randall K.Q. Akee & Jonathan B. Taylor, *Social and Economic Change on American Indian Reservations, A Databook of the US Censuses and the American Community Survey 1990-2010*, at 15, 44, 57(2014); Steven W. Perry, Washington, DC: US Department of Justice, Bureau of Justice Statistics, *A BJS Statistical Profile,*

It is well-recognized that "[h]aving a land base is essential for many tribal economic development activities." U.S. Government Accountability Office, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, GAO-11-543T, 5 (Apr. 7, 2011). "Trust acquisition of land . . . helps generate revenues for public purposes, and helps protect tribal culture and ways of life (*e.g.*, housing for tribal citizens, energy and natural resource development, protections for subsistence hunting and agriculture)." Department of the Interior, Bureau of Indian Affairs, *Land Acquisitions: Appeals of Land Acquisition Decisions*, 78 Fed. Reg. 67928, 67929 (November 13, 2013).

Trust status—as opposed to mere fee ownership—is crucial because transferring land into trust places it under primary tribal and federal jurisdiction. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991); *Cohen*, § 15.07[1][a], at 1010. This jurisdictional status protects the land from state and local taxation, 25 U.S.C. § 465, and carries with it several other features that make trust land attractive to investors.[5]

1992-2002 [NCJ203097], American Indians and Crime (December 2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf.

[5] For one, fee-to-trust can avoid the consequences of double taxation by both state and tribal governments, which "would discourage economic growth." *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2044, 188 L. Ed. 2d 1071 (2014) (Sotomayor, J., concurring). Congress and many tribes have encouraged economic growth by establishing various tax-incentives to spur development in Indian country. *See Cohen*, § 21.01, at 1280; § 8.02[3], at 689-90; § 21.02[4], at 1288. Tribes also attract investment by establishing more efficient land-use regulations or permit requirements tailored to local needs. *See* Julian

Indeed, successful tribal economic development depends in large part on the presence of stable legal infrastructure and institutions that trust land promotes, as well as vesting of decision-making authority in those most affected by economic decisions—the tribes themselves. *See* Stephen Cornell & Miriam Jorgensen, NCAI Policy Research Ctr., *The Nature and Components of Economic Development in Indian Country*, 10-13 (May 1, 2007) (successful economic development "begins with jurisdiction" and relies on subsequent development of "governance infrastructure"). As the degree of "tribal sovereignty rises, so do the chances of successful development." Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, at 15-16 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2003-02 (Jan. 2003).

For these reasons, investigators have concluded that further socioeconomic improvement in Indian country will depend in part on continued acquisition of trust lands. As tribes "invest[] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other infrastructure that supports tribal self-governance, tribes can make "striking" socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, Harvard Project on Am. Indian Econ. Dev., *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses*, at vii, ix-xi (Jan. 2005).

Schreibman, *Developments in Policy: Federal Indian Law*, 14 YALE L. & POL'Y REV. 353, 384 (1996).

2. As Congress Recognized, State and Local Governments and Neighboring Communities Also Benefit from Trust Acquisitions.

Tribal economic development provides revenue for the broader non-Indian community as well. Tribal governments and reservation businesses, for example, separately account for billions of dollars in off-reservation spending. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 604 (2004). In addition, tribal-state revenue sharing agreements and other voluntary intergovernmental service agreements provide millions of dollars in revenue to state and local government coffers. Further, continued improvements in tribes' socioeconomic conditions decrease social service costs for all levels of government. *See* Schreibman, 14 YALE L. & POL'Y REV. at 380.[6]

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[6] The Gun Lake Tribe has provided over $93 million to state and local governments pursuant to revenue sharing agreements since the opening of its gaming facility in 2011. *See Spring Revenue Sharing Payments Surpass $6.7 Million*, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, http://mbpi.org/spring-revenue-sharing-payments-surpass-6-7-million (last visited Sept. 14, 2017); *see also Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties as of August 18, 2017*, Arizona Dep't of Gaming, https://gaming.az.gov/sites/default/files/documents/files/Cumulative%20TC%20amts%20-%20States%20FY2018%20-%201st%20QTR%20.pdf (reporting over $90 million contributed in fiscal year 2016 and over $1.1 billion since contributions began in 2004); Schreibman, 14 YALE L. & POL'Y REV. at 380-81.

C. Examples of Beneficial Uses of Lands Held in Trust-Land for Indian Tribes.

The size, scope, and type of developments occurring on trust land vary greatly. *See, e.g.*, U.S. Gov't Accountability Office, GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, 45-49 (July 2006). Below are recent examples of how tribes have made use of trust lands to benefit their people and surrounding communities.

1. Government Operations and Services.

Among the most important uses of trust lands is the support of tribal government institutions and services. Trust-land acquisitions are crucial to permitting tribes to operate their governments under their own sovereign control, free from intrusion of state or local jurisdictions.

- The Poarch Band of Creek Indians in Alabama, for example, utilizes trust land to house its tribal headquarters, health clinic, and police department.[7]

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[7] *History of the Poarch Band of Creek Indians*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westminster/tribal_history.html (last visited Sept. 14, 2017); *Tribal Government Structure*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westminster/governmen[illegible]html (last visited Sept. 14, 2017); *Tribal Health Department*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westmi[illegible]ster/tribal_health.html (last visited Sept. 14, 2017); *Public Safety*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westminster/public_safety.html (last visited Sept. 14, 2017).

- The Keweenaw Bay Indian Community in Michigan operates its tribal government center, cultural center, police department headquarters, community college, early childhood care center, and two FCC-licensed radio stations on trust lands.[8]
- The Jamestown S'Klallam Tribe in Washington operates a fire station on recently acquired trust land, which provides emergency services for all residents of the county.[9]
- The Oglala Sioux Tribe in South Dakota is utilizing 230,000 acres of recently acquired trust land to support a major housing development on the Pine Ridge Reservation.[10]

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[8] *Tribal Enterprises*, Keweenaw Bay Indian Community, http://www.kbic-nsn.gov/content/tribal-enterprises; *Tribal Police*, Keweenaw Bay Indian Community, http://www.kbic-nsn.gov/content/tribal-police (last visited Sept. 14, 2017); *Tribal Historic Preservation Office*, Keweenaw Bay Indian Community, http://www.kbic-nsn.gov/content/tribal-historic-preservation-office (last visited Sept. 14, 2017); *About Us*, Keweenaw Bay Ojibwa Community College, https://www.kbocc.edu/about-us/ (last visited Sept. 14, 2017); *Child Care Center*, Keweenaw Bay Ojibwa Community College https://www.kbocc.edu/child-care-center/ (last visited Sept. 14, 2017); *Keweenaw Bay Indian Community*, Copper Country, http://www.coppercountry.com/KBIC.php (last visited Sept. 14, 2017).

[9] *Firehouse Blessing Grand Opening*, The Poarch Band of Creek Indians, http://www.jamestowntribe.org/event/firestation/firehouseblessing.htm (last visited Sept. 14, 2017); *Jamestown S'Klallam History*, Jamestown S'Klallam Tribe, http://www.jamestowntribe.org/history/hist_jst.htm (last visited Sept.14, 2017).

[10] U.S. Department of the Interior, Status Report, *Land Buy-Back Program for Tribal Nations* (Nov. 20, 2014) https://

2. Health Care.

Health care facilities and services are another important use of tribal trust land. Tribes frequently utilize trust land to develop tribal health care centers, which often provide services and employment opportunities in rural areas in which health-care services are otherwise severely limited. Many tribal health-care facilities provide much-needed health-care services to nearby non-member residents as well.

- The Confederated Tribes of Grand Ronde operate the Grand Ronde Health and Wellness Center on trust land on the tribes' reservation in rural Oregon, providing services to both Indian and non-Indian patients.[11]
- Similarly, the Reno-Sparks Indian Colony of Nevada utilizes recently acquired trust land to support the tribally owned and operated Reno-Sparks Tribal Health Center, which provides health care services to tribal members and Washoe County urban Indians.[12]

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www.doi.gov/sites/doi.gov/files/migrated/news/upload/Buy-Back ProgramStatusReport-11-20-14-v4.pdf.

[11] *Health and Wellness*, The Confederated Tribes of Grande Ronde, https://www.grandronde.org/departments/health-and-wellness/ (last visited Sept. 14, 2017).

[12] *Reno Sparks Tribal Health Center*, Reno-Sparks Indian Colony, http://www.rsic.org/rsic-services/reno-sparks-tribal-health-center/ (last visited Sept. 14, 2017); Statement of James Cason, Acting Deputy Secretary of the Interior, Comparing 21st Century Trust Land Acquisition With the Intent of The 73rd Congress in Section 5 of The Indian Reorganization Act (July 3, 2017), https://www.doi.gov/ocl/trust-land-acquisition (last visited Sept. 14, 2017).

3. Natural Resources Management and Protection.

Tribes utilize trust-land acquisitions for protection of natural resources and the environment. Taking land into trust allows tribes to determine for themselves how best to manage and utilize their natural resources for the benefit of their people, and to preserve their cultural resources in order to maintain their traditional lifeways.

- The Pueblo of Isleta utilizes over 90,000 acres of recently acquired trust land in New Mexico for cattle ranching, water management and distribution, and as a sanctuary for antelope, deer, and bird species.[13]
- The Ho-Chunk Nation of Wisconsin puts to use over 1,500 acres of recently acquired trust land for prairie and bison habitat and preservation of historic and cultural sites, while planning to use other portions of the land for hospital and municipal fire protection services.[14]

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[13] Department of Interior, Press Release, *Secretary Jewell Announces Obama Administration's Largest Land into Trust Acquisition for Tribal Nations* (Jan. 15, 2016), https://www.doi.gov/pressreleases/secretary-jewell-announces-obama-administration%E2%80%99s-largest-land-trust-acquisition; Albuquerque Journal, *90,000 Acres Transferred Into Trust for Isleta Pueblo* (Jan. 15, 2016), https://www.abqjournal.com/707012/90000-acres-put-in-trust-for-isleta-pueblo.html.

[14] Ho-Chunk Nation Land Management Plan, *Former Badger Army Ammunition Plant, Sauk County, WI* (Oct. 2014), https://cswab.org/wp-content/uploads/2014/12/HCN-Land-Plan-Use-Oct.-2014.pdf; Department of the Interior, *Land Acquisition; Ho-Chunk Nation of Wisconsin*, 80 Fed. Reg. 37651 (July 1, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-07-01/pdf/2015-16196.pdf.

4. Energy Development.

Tribal trust lands provide opportunities for conventional energy development and "are also geographically situated to become great producers of renewable energy resources, such as wind, solar and biomass." Opening Statement of Hon. Daniel K. Akaka, U.S. Senator from Hawaii, *Energy Development in Indian Country*, S. Hrg. 112-628, at 1 (Feb. 16, 2012). Energy development on tribal lands "provide[s] an incredible opportunity not only to increase Tribal energy reliability and self-sufficiency but also provide an opportunity for Tribes to contribute to the Nation's energy security goals." S. Hrg. 112-628, at 7. Statement of Tracey A. Lebeau, Director, Office of Indian Energy Policy and Programs, U.S. Department of Energy. As the Department of Interior has explained, "[t]he ability to take land into trust is critical to . . . energy planning and improving energy development capacity." S. Hrg. 112-628, at 7. Statement of Jodi Gillette, Deputy Assistant Secretary, Indian Affairs, U.S. Department of the Interior. For example, "[t]rust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources." S. Hrg. 112-628, at 19

- The Moapa Southern Pauite Solar Energy Center Project is the first utility-scale solar development operating on tribal trust land and is located on the Moapa River Indian Reservation in Nevada. The project provides renewable energy to Los Angeles residents and generates enough solar energy to power approxi-

mately 111,000 homes, offsetting approximately 341,000 metric tons of carbon dioxide annually.[15]

- The White Earth Band of Ojibwe in northern Minnesota operates two 750 kilowatt wind turbines on trust land on the tribe's reservation in northwest Minnesota.[16] The tribe also plans to build a biomass-based heat and power facility to offset fuel oil and propane costs and reduce emissions.[17]

5. Retail and Other Commercial Projects.

Various other kinds of commercial projects made possible by trust lands inject capital and provide services in underserved tribal communities, increase tribal employment opportunities, and frequently benefit surrounding communities as well.

- The Salt River Prima-Maricopa Indian Community utilized trust lands to build the Salt River Fields at Talking Stick, a professional baseball stadium near Phoenix, which serves as the spring-training facility for the Arizona

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[15] *First Solar, Moapa Southern Paiute Solar Project*, http://www.firstsolar.com/Resources/Projects/Moapa-Southern-Paiute-Solar-Park; *Secretary Jewell Approves Utility-Scale Solar Project on Tribal Land in Nevada*, Press Release (Sept. 15, 2016), https://www.doi.gov/pressreleases/secretary-jewell-approves-utility-scale-solar-project-tribal-land-nevada.

[16] Statement of Hon. Al Franken, U.S. Senator From Minnesota, *Energy Development in Indian Country*, S. Hrg. 112-628, at 4-5 (Feb. 16, 2012).

[17] S. Hrg. 112-628, at 4.

Diamondbacks and the Colorado Rockies.[18] It includes an 11,000-seat capacity stadium, which serves the surrounding community as a high-end venue for events and festivals.

- The Gila River Indian Community utilizes tribal land in Chandler, Arizona for the Phoenix Premium Outlets, which feature ninety stores, including high-end retailers.[19]

II. LEGAL UNCERTAINTY AND LACK OF FINALITY IN THE TRUST ACQUISITION PROCESS ARE SIGNIFICANT IMPEDIMENTS TO THE ABILITY OF TRIBES AND INVESTORS TO PUT TRUST LANDS TO THEIR MOST PRODUCTIVE USE.

This Court's decisions in *Carcieri* and *Patchak I*, which corrected certain previously-held understandings of the legal underpinnings of the trust acquisition process, injected a new degree of substantive and procedural uncertainty into that process. Such legal uncertainty can pose a significant obstacle to tribes who require acquisition of trust lands to promote economic development and strengthen tribal self-government, as discussed above, as well as to the

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[18] *Welcome to Salt River Fields*, Salt River Fields at Talking Stick, http://saltriverfields.com/welcome-to-salt-river-fields/ (last visited Sept. 14, 2017); *Salt River Fields at Talking Stick*, Salt River Prima-Maricopa Indian Community, https://www.srpmic-nsn.gov/economic/springtraining/ (last visited Sept. 14, 2017).

[19] *Phoenix Premium Outlets*, Chandler Arizona, http://www.visitchandler.com/shopping/premium-outlets/ (last visited Sept. 14, 2017); *"Premium Outlets" Featuring 90 Stores, Opens in Chandler (w/ video)*, East Valley Tribune (Apr. 4, 2013), http://www.eastvalleytribune.com/money/premium-outlets-featuring-stores-opens-in-chandler-w-video/article_54c3d71c-9c00-11e2-a846-0019bb2963f4.html.

tribal and non-tribal investors who supply the capital necessary to make these projects a reality. In both decisions, this Court noted that Congress was free to address these perceived challenges. As explained below, the Gun Lake Act was drafted and enacted in 2014 against the backdrop of significant judicial and legislative developments highlighting problems with lack of certainty and finality, amidst intensifying calls for these issues to be addressed by Congress.

A. Access to Capital, Which Is Critical to Tribal Economic Development, Is Diminished by Instability.

Inadequate access to capital is among the most significant impediments to tribal economic development. Access to capital dictates the amount of economic success a tribe can realistically expect, given the challenges of growing businesses on previously undeveloped land that is often rural and relatively isolated.

Capital is needed not only for private enterprise, but also "for the large investments that make the operation of a modern tribal government possible. They, their subdivisions, and related public service entities (such as housing authorities or tribal utilities) must be able to fund the construction of government buildings, health clinics, schools, housing, roads, jails, water and sewer systems, electricity grids, telecommunications networks, recreational spaces, and more." Native Nations Institute, *Access to Capital and Credit in Native Communities*, at 61 (May 12, 2016), nni.arizona.edu/.../files/.../Accessing_Capital_and_Credit_in_Native_Communities.pdf

Questions regarding the validity of transactions taking land into trust, particularly where those ques-

tions linger for years after title is transferred, create uncertainty that diminishes the availability of capital to tribes. Indeed, the Government Accountability Office has raised this very concern in testimony before Congress—that "[l]and in [t]rust [i]ssues [m]ay [c]reate [u]ncertainty" that threatens to suffocate economic development and activity. Anu K. Mittal, Director of Natural Resources and Environment, U.S. Government Accountability Office, House of Representatives Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, GAO-11-543T, at 5..

B. Congress Was Well Aware of the New Wave of Litigation That Was Threatening to Destabilize the Trust Acquisition Process.

1. Litigation Following *Carcieri* Introduced Substantive Uncertainty into the Process.

In *Carcieri*, this Court ruled that the Secretary of the Interior may take land into trust for tribes recently recognized by the Federal Government only if the trust acquisition has been authorized by legislation other than the IRA or the tribe can demonstrate that it was "under Federal jurisdiction" as of 1934. Although such a holding would potentially require many tribes, as part of the trust acquisition process, to engage in a difficult, fact-intensive historical analysis, this Court noted that the issue was one of statutory construction and thus squarely left in the lap of Congress: "Had Congress intended to legislate such a definition [of tribes for whom land can be taken into trust], it could

have done so explicitly . . . . Instead, Congress limited the statute . . . and 'we are obliged to give effect, if possible, to every word Congress used.'" 555 U.S. at 392, quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As Justice Stevens observed to government counsel during oral argument, if "we disagree with your interpretation and Congress thinks we are wrong they can pass another one of these 15, 16 provisions that they have that says this tribe is . . . recognized now." *Carcieri v. Kempthorne*, No. 07-526, Oral Arg. Tr. at 53:3-6 (Nov. 3, 2008).

As anticipated, the years immediately following *Carcieri* witnessed a new wave of litigation challenging trust acquisitions,[20] as well as repeated calls for Congress to "fix" the uncertainty with new legislation. As the Assistant Secretary of Indian Affairs for the Department of the Interior testified: "Without [a legislative] fix by Congress, *Carcieri* presents a potential problem for any tribe by allowing opponents to mire routine trust applications in protracted and unnecessary litigation." U.S. Senate Committee on Indian Affairs, *Carcieri*: Bringing Certainty to Trust Land Acquisitions (Nov. 20, 2013), at 11. He explained that the *Carcieri* decision was generating "costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934." *Id.* at 12. Indeed,

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[20] *See, e.g.*, *The Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, No. 14-5326, 2016 WL 4056092 (D.C. Cir. July 29, 2016); *Central New York Fair Business Ass'n v. Jewell*, No. 6:08-CV-0660, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015); *No Casino in Plymouth and Citizens Equal Rights Alliance v. Jewell*, 136 F. Supp. 3d 1166 (E.D. Cal. 2015); *Cty. of Amador v. Jewell*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015); *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016).

he told the Senate Committee, "we are up to our eyeballs in litigation on these matters." *Id.* at 13.

The Gun Lake Act's legislative history echoes the concerns expressed in that testimony and reflects Congress' awareness that "there ha[d] been an uptick in frivolous suits against tribal lands" between 2009 and 2014, and that "unless and until we have a *Carcieri*-fix legislation enacted, these types of piecemeal bills will become routinely needed to protect tribal lands that are rightfully held in trust." 160 Cong. Rec. H7485 (2014). *See also* Congressional Research Service, *Carcieri v. Salazar*: The Secretary of the Interior May Not Acquire Trust Land for the Narragansett Indian Tribe Under 25 U.S.C. Section 465 Because That Statute Applies to Tribes "Under Federal Jurisdiction" in 1934, at 18-22 (Aug. 23, 2016) ("CRS") (documenting cases pending as of 2014).

2. Litigation Following *Patchak I* Introduced an Additional Layer of Procedural Uncertainty into the Process by Undermining Finality of Land Transactions.

In 2011, this Court's decision in *Patchak I* introduced procedural uncertainty into the trust acquisition process by "refuting a long-held assumption that U.S. sovereign immunity under the Quiet Title Act barred challenges to any decision of the Secretary to take land into trust once title has passed by the United States." CRS, *supra*, at 1.

The invitation to Congress that was implicit in *Carcieri* was made explicit in *Patchak I*, where the Court observed: "According to the Government, allowing challenges to the Secretary's trust acquisitions would 'pose significant barriers to tribes[']. . . ability

to promote investment and economic development on the lands.' . . . . That argument is not without force, but it must be addressed to Congress." 567 U.S. at 223.

As the Congressional Research Service subsequently recognized, the result in *Patchak I* would "encourage more suits seeking to set aside [Interior] decisions to take land into trust for Indian tribes," as such suits were no longer cut off by the United States' sovereign immunity the moment title transferred to the government, but could now be utilized by opponents of tribal projects to unsettle land transactions that had long since passed. CRS, at 1.

The litigation in *Big Lagoon Rancheria* illustrates the extent to which litigants attempted to re-open past land transfers, thus undermining the ability to ensure finality and repose in trust acquisitions. In that case, the Bureau of Indian Affairs had acquired in trust an eleven-acre parcel for Big Lagoon Rancheria in 1994. The State of California filed a timely but unsuccessful challenge to that trust acquisition. 789 F.3d at 951. The Big Lagoon Rancheria subsequently sued California under the Indian Gaming Regulatory Act ("IGRA"), claiming that the state had failed to negotiate its gaming compact in good faith. *Id.* at 951-52.

The district court found in favor of the tribe, but was reversed in June 2014 by a Ninth Circuit panel. Relying on a combination of *Carcieri* and *Patchak I*, the panel ruled that it was permissible for the State to raise a retroactive, collateral attack on the validity of the trust acquisition that had closed two decades earlier, on the ground that the tribe had not been under federal jurisdiction in 1934. *Id.* at 952 n.5. This

was the law of the Ninth Circuit at the time the Gun Lake Act was signed into law.

The Ninth Circuit later granted rehearing *en banc*, vacating the panel opinion and, in 2015, issuing a new opinion affirming the district court.[21] But the 2014 panel decision, by opening the door to retroactive collateral challenges, was emblematic of concerns being expressed at the time about the resurgence of litigation that had been prompted by *Carcieri* and *Patchak I*—concerns that were resounding in the halls of Congress as the Gun Lake bill was under consideration. The cost of the Big Lagoon Rancheria litigation and others like it,[22] and the uncertainty and lack of finality that the parties encountered, were precisely the frustrations identified in the Department of the Interior's testimony before the Senate Committee on Indian Affairs in late 2013—the same Committee that sponsored the Gun Lake Act: *See* Testimony of Kevin Washburn, at 12, "[T]he *Carcieri* decision, combined

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[21] Sitting *en banc*, the Ninth Circuit held that the State's claim challenging the validity of a trust acquisition—premised on the allegation that the tribe had not been "under federal jurisdiction" in 1934—could not be raised as a collateral attack in the context of a separate dispute under IGRA. Instead, any challenge to the BIA's fee-to-trust decision from 1994 could be brought only under the APA, which has a six-year statute of limitations. *Id.* at 953-54.

[22] The Poarch Band of Creek Indians, for example, brought suit to enjoin a tax audit conducted by Escambia County, Alabama, concerning the validity of a trust acquisition that had occurred decades earlier. *See Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 938 (11th Cir. 2016). The district court granted that injunction, and the Eleventh Circuit affirmed, ruling that parties must bring challenges to trust-land acquisitions under the APA (and within the appropriate statute of limitations), rather than as a collateral challenge. *Id.* at 943-44.

with the *Patchak* decision, casts a dark cloud of uncertainty on land acquisitions for tribes under the Indian Reorganization Act, and ultimately inhibits and discourages the productive use of tribal trust land itself." .

3. Congress Has Considered a Variety of Options to Address the Uncertainty Introduced by the Wave of Litigation Following the *Carcieri* and *Patchak I* Decisions.

As then-Judge Gorsuch once observed in the context of a longstanding Indian reservation and jurisdictional boundary dispute that seemingly defied resolution, at a certain point one must conclude that "'[t]he time has come...to respect the peace and repose promised by settled decisions.'" *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, 835 F.3d 1255, 1260 (10th Cir. 2016), *cert. dismissed*, 137 S. Ct. 2328 (2017), quoting *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1013 (10th Cir. 2015). In the context of the trust-acquisition program, Congress has similarly recognized the value of respecting settled decisions. In response to the offers extended by this Court in *Carcieri* and *Patchak I* to "fix" the instability that has been injected into the process, numerous pieces of legislation have been proposed and debated.[23]

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[23] The 113th Congress, for example, introduced H.R. 279 and H.R. 666/S.2.188, which would have amended the IRA to define, retroactively, the term "Indian" to mean "any federally recognized Indian tribe," regardless of whether such tribe was under federal jurisdiction as of 1934. Similarly, the 114th Congress introduced S. 1879, S. 732/H.R. 407, and H.R. 249, which would have amended the IRA to define "Indian" to mean "all persons of

To date, Congress has not had the votes necessary to pass an across-the-board solution. Instead, as it has done numerous times in the past,[24] Congress has reverted to *ad hoc* legislation to ensure certainty and finality for particular tracts of land for specific tribes. The Gun Lake Act is just one such example, among several, in which Congress has sought to restore "peace and repose," *Ute Indian Tribe*, 835 F.3d at 1260, with respect to Indian land tenure on a case-by-case basis.[25]

Indian descent who are members of any federally recognized Indian tribe . . . ."

[24] *See, e.g.*, Navajo and Hopi Indian Relocation Amendments Act of 190, 25 U.S.C. § 640d-9, enacted July 8, 1980 (declaring that certain lands would be held in trust for the benefit of the Navajo and Hopi tribes); 102 Stat. 1594/Pub. L. 100-425, enacted on Sept. 9, 1988 (holding land in trust for the use and benefit of the Confederated Tribes of the Grand Ronde Community of Oregon); 25 U.S.C. § 1300j-5, Pub. L. 103-323, enacted Sept. 21, 1994 (specifically defining land held by the Pokagon Band of Potawatomi Indians as trust land).

[25] *See, e.g.*, 126 Stat. 257/Pub. L. 112-97, enacted on Feb. 27, 2012 (placing into trust 510 acres for the benefit of the Quileute Indian Tribe); 128 Stat. 2122/Pub. Law 113-232, enacted on Dec. 16, 2014 (providing for an exchange of land to resolve land disputes created by the realignment of the Blackfoot River along the boundary of the Fort Hall Indian Reservation); Nevada Native Nations Land Act, 130 Stat. 958/Pub. Law 114-232, enacted on Oct. 7, 2016 (placing into trust 82 acres for the Shoshone-Paiute Tribes, 941 acres for the Summit Lake Paiute Tribe, 13,434 acres for the Reno-Sparks Lake Paiute Tribe, and 31,269 acres for Duckwater Shoshone Tribe).

III. THE GUN LAKE ACT SHOULD BE CONSTRUED AS ACCEPTANCE BY CONGRESS OF THIS COURT'S OFFER TO RECTIFY THE UNCERTAINTY AND LACK OF FINALITY INJECTED INTO THE TRUST ACQUISITION PROCESS BY *CARCIERI* AND *PATCHAK I*.

With the Gun Lake Act, Congress simply affirmed the trust status of, and restored the sovereign immunity of the United States with respect to, one particular parcel of land for one specific Indian tribe. It did so to ensure finality and certainty for the Gun Lake Tribe and its ability to pursue further economic development of the Bradley Property. In leveraging the legislative process to counter uncertainty created by this Court's decisions, and at the invitation of this Court to do so, Congress acted well within its authority.

The simplest reading of the Gun Lake Act—an affirmation of trust status and restoration of United States sovereign immunity—is, in fact, consistent with this Court's instructions to construe statutes in their full context, so as to avoid raising difficult questions of constitutional law. In *Yates v. United States*, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015), for example, this Court construed the definition of a particular term within the Sarbanes-Oxley Act by taking into account the political and legal context for the statute and the definition of the term at issue. In doing so, the Court relied on a basic principal of statutory construction: "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by references to the language itself, [but as well by] the specific context in which the

language is used, and the broader context of the statute as a whole.'" *Id.* at 1081-82, quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). It also is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993) (citations omitted).

In *Bond v. United States*, 134 S. Ct. 2077, 2090, 189 L.Ed.2d 1, (2014), this Court again emphasized the need to engage in a full contextual analysis of statutory text, in holding that a statute imposing criminal penalties did not apply to an altercation between acquaintances, and thus that it did not need to evaluate the parties' claims regarding the Tenth Amendment and international treaties. The Court noted the particular importance of contextual interpretation in a situation, like the instant case, that also implicates the canon of constitutional avoidance: the premise that this Court should construe statutes so as to avoid raising—and therefore deciding—difficult questions of constitutional law.

This Court similarly should read the Gun Lake Act in full context, against the backdrop of contemporary developments in the trust-acquisition program that were capturing the attention of the relevant congressional committees at the time. In doing so, this Court should reach the same conclusion as the D.C. Circuit—that the Gun Lake Act is a constitutional use of Congress' power to assure finality and certainty with respect to a parcel of land held in trust for tribal economic development.

CONCLUSION

The undersigned amicus respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

SEP

No. 16-498

IN THE

Supreme Court of the United States

DAVID PATCHAK, PETITIONER,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE U.S. HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The U.S. House of Representatives[2] has a compelling institutional interest in preserving the full scope of its broad legislative authority under the Constitution. This case concerns the constitutionality of the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014) ("Gun Lake Act"). The Gun Lake Act ratified and confirmed the decision of the Secretary of the Interior to take certain land (the "Bradley property") into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, and it removed federal subject-matter jurisdiction over any actions relating to the property.

The court of appeals correctly held that the Gun Lake Act was a permissible exercise of Congress's authority to "withdraw subject matter jurisdiction" over a class of cases and "to direct district courts to apply" the "newly enacted legislation in pending civil cases." J.A. 34-35. Petitioner's contrary argument – that the Act's purportedly "unusual" direction that courts "shall promptly dismiss" any lawsuit relating to the Bradley property encroaches upon the judicial authority, Pet. Br. 18 – cannot be reconciled with the precedents of this Court. Nor can

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[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

[2] The Bipartisan Legal Advisory Group ("BLAG"), which consists of the Speaker, the Majority Leader, the Majority Whip, the Democratic Leader, and the Democratic Whip, voted unanimously to authorize the filing of this brief on behalf of the House. The BLAG "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b) of the U.S. House of Representatives (115th Cong.).

it be reconciled with the broad sweep of Congress's legislative power, as evidenced by more than a century of legislative practice during which Congress has enacted countless provisions directing courts to dismiss lawsuits under a wide variety of circumstances. If accepted, petitioner's position would upset the separation of powers enshrined in the Constitution, by eviscerating Congress's long-established authority to enact legislation defining and limiting the subject-matter jurisdiction of the federal courts.

SUMMARY OF ARGUMENT

This case presents the question whether the legislative power conferred on Congress by the Constitution is sufficient to sustain legislation directing the courts to "promptly dismiss" any lawsuit relating to the Bradley property. It plainly is.

I. The Gun Lake Act falls squarely within the broad scope of Congress's legislative authority. The Act has two operative provisions: Section 2(a) ratifies and confirms the Secretary of the Interior's decision to take the Bradley property into trust, and section 2(b) provides that no action concerning the property shall be filed or maintained in federal court and that any such action, including any pending action, shall be promptly dismissed.

Section 2(a) is an exercise of Congress's plenary power over matters pertaining to Indian tribes, which Congress has frequently employed to take land into trust for the benefit of such tribes. Here, Congress enacted section 2(a) to eliminate any alleged legal deficiencies in the Secretary's decision to take the Bradley property into trust. This Court's precedents have long established that Congress is empowered to ratify actions of the Executive

Branch that it might have authorized, and that such ratification is equivalent to an original grant of authority.

Section 2(b) streamlines the implementation of Congress's definitive decision in section 2(a) to take the Bradley property into trust, by withdrawing subject-matter jurisdiction over lawsuits relating to the Bradley property. It is similarly well within Congress's broad legislative authority. This Court has repeatedly confirmed that Congress is empowered to define the jurisdiction of the lower federal courts, and that such legislation may be made applicable to pending cases. While the Gun Lake Act withdraws jurisdiction over a relatively narrow class of cases – only those cases relating to the Bradley property – the Court has consistently held that Congress may enact legislation that is as particularized as it sees fit.

II. The Gun Lake Act does not intrude impermissibly upon the judicial power. In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court observed that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 147. Subsequent to *Klein*, however, the Court has made clear that "[o]ne cannot take this language from *Klein* 'at face value,'" because "'congressional power to make valid statutes retroactively applicable to pending cases has often been recognized.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (citation omitted). In particular, legislation that affects outcomes in pending cases does not run afoul of *Klein* as long as it "compel[s] changes in law, not findings or results under old law." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992). Here, the Gun Lake Act unquestionably changed the law, both by eliminating preexisting grounds for legal challenges to the trust sta-

tus of the Bradley property and by removing subject-matter jurisdiction over any case relating to the property. *Klein* therefore has no application here.

Petitioner nevertheless contends that the Gun Lake Act's direction that courts "shall promptly dismiss" any lawsuit relating to the Bradley property constitutes an impermissible intrusion upon the judicial power. Petitioner is mistaken. Section 2(b)'s requirement that courts "shall promptly dismiss" any lawsuit that meets the statutory criteria is necessarily inherent in the statute's removal of federal-court jurisdiction over actions relating to the Bradley property – a jurisdictional modification that Congress was plainly empowered to enact. Similar language has been used in countless other federal statutes for over a century. There is no credible basis for questioning Congress's authority to direct the federal courts to dismiss cases over which they lack subject-matter jurisdiction. Indeed, prompt dismissal of such cases would be required even in the absence of an express congressional direction. The decision of the court of appeals should be affirmed.

ARGUMENT

I. THE GUN LAKE ACT IS WELL WITHIN CONGRESS'S LEGISLATIVE AUTHORITY

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested" in Congress. U.S. Const. art 1, § 1. Congress validly enacted the Gun Lake Act pursuant to its broad legislative authority.

A. Congress Has Plenary Power To Take Lands Into Trust For Indian Tribes And To Ratify Agency Decisions To That Effect

Section 2(a) of the Gun Lake Act provides that "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians * * * is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Pub. L. No. 113-179, 128 Stat. 1913, § 2(a). Petitioner claims that "[t]he meaning and effect of this language is hardly self-evident," Pet. Br. 19, but the provision could not be more clear.

By its plain terms, section 2(a) "ratified and confirmed" the decision of the Secretary to take the Bradley Property into trust. Pub. L. No. 113-179, 128 Stat. 1913, § 2(a); *see* H. Rep. No. 113-590 (2014) (S. 1603 "reaffirm[s] that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians"); 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (statement of Rep. D. Hastings) ("S. 1603 ratifies a decision of the Secretary of the Interior to acquire land and place it in trust for the Gun Lake Tribe of Michigan."); *id.* (statement of Rep. Grijalva) ("S. 1603 * * * simply affirms that the land taken into trust for the Gun Lake Tribe in Michigan is Indian land and is rightfully held in trust by the United States for the tribe's benefit."); *id.* (statement of Rep. Upton) ("This bill is really quite simple. It merely reaffirms the U.S. Secretary of Interior's action of taking this land into trust for the Gun Lake Tribe."); Hearing on S. 1603, S. 1818, S. 2040, S. 2041, and S. 2188, Before the S. Comm. on Indian Affairs, 113 Cong. 2 (2014) (statement of Sen. Tester) ("S. 1603 would ratify and confirm the Secretary's taking of land into trust for the Gun Lake Band.").

The unambiguous effect of this statutory language is to eliminate any legal grounds that might previously have existed for challenging the Secretary's decision to take the Bradley property into trust. Thus, section 2(a) effectively mooted the claims of individuals, like petitioner, who contend that the Secretary's decision was not authorized by preexisting law.

Section 2(a) is unquestionably a valid exercise of Congress's legislative power. As this Court has long recognized, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). Indeed, the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted). Congress has frequently exercised that far-reaching legislative authority by taking land into trust for Indian tribes, just as it did here. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.04(3)(b) (2012); *id.* § 15.07(1)(b), at 1042 & n.22.[3]

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[3] *See, e.g.*, Pub. L. No. 106-568, §411(b), 114 Stat. 2868 (2000) ("[T]he Secretary shall take into trust for the benefit of the Sioux Nation the parcel of land in Stanley County, South Dakota, that is described as the 'Reconcilliation Place Addition.'"); Pub. L. No. 98-602, § 105(b)(1), 98 Stat. 3149 (1984) ("[S]uch funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of [the Wyandotte] Tribe [of Oklahoma]."); Pub. L. No. 95-498, 92 Stat. 1672 (1978) ("[A]ll right, title, and interest of the United States in the following lands situated * * * within the state of New Mexico are hereby declared to be held by the United States in trust for the benefit and use of the Pueblo of Santa Ana."); Pub. L. No. 95-337, 92 Stat. 455 (1978) ("[T]wo thousand seven hundred acres, more

In addition, Congress was plainly authorized to ratify the Secretary's decision. It is "well settled that Congress" has the power to "'ratify * * * acts which it might have authorized.'" *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301 (1973) (quoting *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878))). Indeed, the Court has explained that this "power of ratification" is "so elementary as to need but statement." *United States v. Heinszen*, 206 U.S. 370, 382 (1907). Such ratification, moreover, is "conclusive upon the courts." *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

Petitioner argues that section 2(a) did not "chang[e] the legal status of the property." Pet. Br. 19. But when, as here, Congress ratifies an action of the Executive Branch, that ratification is "equivalent to an original authority." *Mattingly*, 97 U.S. at 690; *Wilson*, 204 U.S. at 32. By ratifying an action, Congress "may therefore cure irregularities, and confirm proceedings, which without the confirmation would be void." *Mattingly*, 97 U.S. at 690. In other words, ratification "give[s] the force of law to official action" that may have been "unauthorized when taken." *Swayne & Hoyt*, 300 U.S. at 302. Accordingly, particularly in light of petitioner's contention that the Secretary's initial decision concerning the Bradley property was contrary to law, section 2(a) *does* change the legal status of the property: it removes any legal doubt about the validity of that decision, by giving it the "force of law," *Swayne & Hoyt*, 300 U.S. at 302 (citations omitted), and "cure[ing]" any alleged "irregularities"

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or less, are hereby held in trust for the Paiute and Shoshone Tribes[.]"); Pub. L. No. 75-397, 50 Stat. 868 (1937) ("[T]he title to said lands shall be and remain in the United States in trust for the Indians of the Blackfeet Tribe[.]").

such as those asserted by petitioner, *Mattingly*, 97 U.S. at 690.

B. The Constitution Empowered Congress To Withdraw Jurisdiction Over Actions Relating To The Bradley Property And Make That Withdrawal Applicable To Pending Cases

Section 2(b) of the Gun Lake Act provides that "an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to [the Bradley property] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Pub. L. No. 113-179, 128 Stat. 1913, § 2(b). This provision withdraws subject-matter jurisdiction over lawsuits relating to the Bradley property, thereby prohibiting "any action relating to the [property] from being brought or maintained in federal court." H. Rep. No. 113-590 (2014). As with section 2(a), this provision falls squarely within the scope of Congress's legislative authority.[4]

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[4] Because section 2(b) is plainly constitutional as a jurisdiction-defining provision, the Court need not address the alternative argument that section 2(b) is also constitutional on the grounds of sovereign immunity. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' Resp. Br. 15-24; Federal Respondents' Br. 23-27; *see also* J.A. 43 ("[B]ecause we conclude that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn, we need not consider" the argument that "the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity."). If the Court chooses to address that issue, however, the House agrees that Congress's plenary power to waive, preserve, or reinstate the sovereign immunity of the United States provides an independent and equally compelling alternative ground for sustaining the constitutionality of the Gun Lake Act.

As an initial matter, "[t]here can be no question of the power of Congress * * * to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (citing *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233 (1922)). That is so because "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution," and the "power to ordain and establish inferior courts includes the power of investing them with jurisdiction." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (citation and quotation marks omitted). Both "[t]he decision [whether to create] inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress." *Palmore v. United States*, 411 U.S. 389, 400-01 (1973).[5]

It is also well established that, "having a right to prescribe [jurisdiction], Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Accordingly, any "jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Kline*, 260 U.S. at 234. Indeed, the "position has held constant since at least 1845" that with respect to the lower federal courts, "'the judicial power of the United States * * * is * * * dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the

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[5] *See also Kline*, 260 U.S. at 234 ("Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions.").

sole power of creating th[os]e tribunals * * * and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

As confirmed by more than two centuries of this Court's precedents, it is equally incontrovertible that "Congress * * * may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016); *see, e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429-30 (1855); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). As Chief Justice Marshall cogently observed, "if subsequent to the judgement and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional * * * I know of no court which can contest its obligation." *Schooner Peggy*, 5 U.S. at 110. Indeed, the Court has even upheld statutes that specified – by name and docket number – the pending cases to which the change in law should apply. *See, e.g.*, *Bank Markazi*, 136 S. Ct. at 1317; *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).[8]

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[8] *See Bank Markazi*, 136 S. Ct. at 1319 ("Section 8772(b) defines as available for execution by holders of terrorism judgments against Iran 'the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*,

Accordingly, the Court has "regularly applied intervening statutes conferring or ousting jurisdiction" in pending cases. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994). "[J]urisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234; *accord Bruner v. United States*, 343 U.S. 112, 116-17 (1994) ("[W]hen a law conferring jurisdiction is repealed without reservation as to pending cases, all cases fall within in the law."); *Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) (holding that "[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress") (citations omitted).

Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings.'") (quoting 22 U.S.C. § 8772(b)); *Robertson*, 503 U.S. at 434-35 ("'[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F. Dale Robertson*, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.'" (quoting Dep't of the Interior and Related Agencies Appropriations Act of 1990, 103 Stat. 745, § 318(b)(6)(A)).

Section 2(b) falls well within the broad confines of Congress's power to define and limit the jurisdiction of the lower federal courts, as confirmed by these precedents. Section 2(b) withdraws subject-matter jurisdiction over a specific category of lawsuits (namely, all suits relating to the Bradley property), and specifies that this change in the law shall apply to both pending and future cases. Congress has ample authority to adjust the jurisdiction of the lower federal courts in this manner, pursuant to the bedrock constitutional principle that "jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Kline*, 260 U.S. at 234.

Petitioner nevertheless suggests that section 2(b) exceeds "'the legislative power to make general law'" because "[i]t directed the federal courts to 'promptly dismiss' Petitioner's lawsuit." Pet. Br. 11 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995)). Petitioner is mistaken. As an initial matter, section 2(b) is not addressed solely to petitioner's lawsuit. Rather, it applies generally to *any* pending or future lawsuit relating to the Bradley property, regardless of the identity of the plaintiff or defendant. Pub. L. No. 113-179, 128 Stat. 1913, § 2(b). It is therefore far more "general" than petitioner contends.

More fundamentally, petitioner's argument rests on the mistaken "assumption that legislation must be generally applicable" to pass constitutional muster and that "'there is something wrong with particularized legislative action.'" *Bank Markazi*, 136 S. Ct. at 1327 (quoting *Plaut*, 514 U.S. at 239 n.9). To the contrary, "[t]his Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." *Id.* at 1328

(collecting cases); *see Plaut*, 514 U.S. at 239 n.9 ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid."); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977) (noting that legislation may concern "a legitimate class of one"). Indeed, in *Bank Markazi*, the Court recently upheld as constitutional legislation that applied to a single consolidated proceeding. 136 S. Ct. at 1326-27. For the same reasons, section 2(b) falls well within Congress's legislative authority.

II. THE GUN LAKE ACT DOES NOT INTRUDE UPON THE JUDICIAL POWER

The Gun Lake Act does not encroach upon the judicial power. It is well established that Congress does not offend the separation of powers when it changes the applicable procedural or substantive law that courts must apply in matters pending before them, even if the effect of such a change is outcome-determinative in a particular case. The Gun Lake Act is a permissible implementation of that undisputed principle because the Act changed the law in two respects, both by confirming the trust status of the Bradley property (thereby repealing any grounds for challenging that status under prior law) and by removing subject-matter jurisdiction over any lawsuits relating to the property. Petitioner's arguments to the contrary cannot be reconciled with the precedents of this Court or with more than a century of legislative practice.

A. The Gun Lake Act Changes The Law Rather Than Compelling Findings Or Results Under Preexisting Law

"Article III of the Constitution establishes an independent Judiciary * * * with the 'province and duty * * * to

say what the law is' in particular cases and controversies." *Bank Markazi*, 136 S. Ct. at 1322 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court has identified three "types of legislation" that may infringe upon the judicial power. *Plaut*, 514 U.S. at 218. First, the Court stated in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871), that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it," although subsequent decisions have sharply limited the seemingly broad sweep of this dictum. *See, e.g.*, *Bank Markazi*, 136 S. Ct. at 1324 (cautioning that "[o]ne cannot take this language from *Klein* 'at face value,'" because "'congressional power to make valid statutes retroactively applicable to pending cases has often been recognized'") (citation omitted). Second, the Court has held that Congress may not "vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S. at 218 (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)). Finally, Congress may not "retroactively comman[d] the federal courts to reopen final judgments." *Plaut*, 514 U.S. at 219. This case concerns only the first of these principles.

Klein addressed the constitutionality of an appropriations provision enacted by the Reconstruction Congress in response to the Supreme Court's decision in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869), which had held that a presidential pardon for disloyal conduct during the Civil War was sufficient proof of loyalty to entitle pardon recipients to recover property seized from them by the Union forces. *Id.* at 543. The statutory provision at issue purported to preclude the federal courts from considering such a pardon "'as evidence in support of any claim against the United States'" for the recovery

of forfeited property, and instead required the courts to "'take[] and deem[]'" a person's acceptance of such a pardon as "'conclusive evidence'" requiring dismissal of such a claim (or, if judgment had already been entered by the Court of Claims in such person's favor, requiring the Supreme Court to dismiss the case for lack of jurisdiction). *Klein*, 80 U.S. at 133-34 (quoting Act of July 12, 1870, 16 Stat. 230, 235).

The Court struck down this provision as unconstitutional, for two reasons. *First*, the provision did not create any "new circumstances," but instead required courts to "deem" certain evidence insufficient to satisfy a standard established by existing law, thereby forbidding the Judiciary "to give the effect to evidence which, in its own judgment, such evidence should have." *Klein*, 80 U.S. at 134, 146-47. In other words, the provision "prescribe[d] [a] rule of decision" for courts because it directed them "to give [evidence] an effect precisely contrary" to the courts' "own judgment." *Id.* at 146-47. Accordingly, "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

Second, the Court held that the provision impermissibly "impair[ed] the effects of a pardon, and thus infring[ed] the constitutional power of the Executive." *Klein*, 80 U.S. at 147. The Court explained that "the legislature cannot change the effect of * * * a pardon any more than the executive can change a law." *Id.*

"*Klein* has been called 'a deeply puzzling decision,'" *Bank Markazi*, 136 S. Ct. at 1323 (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2538 (1998)), and as noted its seemingly broad reference to "prescrib[ing] rules of decision" can-

not be taken "'at face value.'" *Id.* at 1325 (quoting Richard H. Fallon et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 324 (7th ed. 2015)); *see Plaut*, 514 U.S. at 218 (questioning "the precise scope of *Klein*"); *Miller v. French*, 530 U.S. 327, 349 (2000) (same). Indeed, in the entire history of the Republic, "the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed." Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. Cin. L. Rev. 53, 55 (2010).

This Court's subsequent cases make clear that *Klein*'s "rules of decision" dictum stands only for the proposition that "Congress * * * may not usurp a court's power to interpret and apply the law to the circumstances before it." *Bank Markazi*, 136 S. Ct. at 1323 (citation and internal punctuation omitted). Put another way, Congress may not "prescribe or superintend how [the courts] decide * * * cases." *City of Arlington v. F.C.C.* 569 U.S. 290, 297 (2013) (citation omitted); *see Bank Markazi*, 136 S. Ct. at 1324 ("[T]he statute in *Klein* infringed the judicial power * * * because it attempted to direct the result without altering the legal standards * * *."). This is because it is the province of the courts, and not the legislature, to "apply [a] rule to particular cases" and "of necessity expound and interpret that rule." *Marbury*, 5 U.S. at 177. This division of authority prevents Congress from "commandeering the courts to make a political judgment look like a judicial one." *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting). But it is emphatically the province of the Legislative Branch to make or amend the law – even when the effect of such alterations is to change the outcome of pending cases. *See, e.g.*, *Bank Markazi*, 136 S. Ct. at 1325 ("[Y]es, we have affirmed,

Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.").

Consistent with these principles, this Court's post-*Klein* decisions "have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (citing *Robertson*, 503 U.S. at 441); *Bank Markazi*, 136 S. Ct. at 1317 (same); *Miller*, 530 U.S. at 349 (same). Thus, "a statute does not impinge on judicial power when it directs courts to apply a new legal standard" to pending cases, even when that legal standard "effectively permit[s] only one possible outcome." *Bank Markazi*, 136 S. Ct. at 1325; *see Pope v. United States*, 323 U.S. 1, 11 (1944) ("When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable.").

For example, in *Robertson*, the Court considered a challenge to a provision in the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. Law No. 101-121, § 318, 103 Stat. 701, 745 (1989), that had the effect of changing the results of pending litigation. Congress adopted the provision in response to two lawsuits claiming that the government's harvesting and sale of timber in certain Pacific Northwest forests violated five preexisting statutory requirements. *Robertson*, 503 U.S. at 431-33. The Act provided that "Congress hereby determines and directs that management of areas according to [the provisions in the Act] is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the [two lawsuits]." *Id.* at 434-35

(quoting 103 Stat. at 747). This Court upheld the provision, on the ground that it "compelled changes in law" rather than "findings or results under old law." *Id.* at 438. "Before [the provision] was enacted," the Court explained, "the original claims would fail only if the challenged harvesting violated none of five old provisions," whereas under the Act, "those same claims would fail if the harvesting violated neither of two new provisions." *Id.*

Likewise, in *Miller*, the Court upheld the the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. Law No. 104-134, §§ 801-810, 110 Stat. 1321, 1366-77 (1996), which imposed new requirements for continuing prospective relief in civil actions challenging prison conditions. In particular, the statute's provisions had the effect of changing the results of pending litigation by mandating an automatic stay of certain previously-issued injunctions. The Court squarely rejected the prisoners' argument that Congress had impermissibly "prescribed a rule of decision because, for the period of time until the district court makes a final decision on the merits of the motion to terminate prospective relief, [the PLRA] mandates a particular outcome: the termination of prospective relief." *Miller*, 530 U.S. at 349. The Court instead explained that "[r]ather than prescribing a rule of decision, [the PLRA] simply imposes the consequences of the court's application of the new legal standard." *Id.*

Finally, in *Bank Markazi*, the Court upheld a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772, that "designate[d] a particular set of assets and render[ed] them available to satisfy the liability and damages judgments underlying a consolidated enforcement proceeding that the statute identifie[d] by the District Court's docket number." 136

S. Ct. at 1317. The Court explained that the provision "provide[d] a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets," and that "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary." *Id.* at 1326.

The Gun Lake Act similarly compels a change in the law, rather than purporting to direct courts to make particular findings or reach particular conclusions under old law. Petitioner contends that the Act does not "amend[] underlying substantive or procedural laws," Pet. Br. 12; *see also id.* at 11, 16, 18, but that is patently incorrect. Section 2(b) explicitly changes the law by providing that, "*[n]otwithstanding any other provision of law*, an action * * * relating to [the Bradley property] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Pub. L. No. 113-179, 128 Stat. 1913 § 2(b) (emphasis added). That provision necessarily modified the federal statutes that had previously conferred federal-court jurisdiction over such lawsuits, *see, e.g.*, 5 U.S.C. § 702; 28 U.S.C. §1331, thereby changing the law.[7]

Klein itself recognized that if the appropriations provision at issue there had "simply denied the right of appeal in a particular class of cases, there could be no doubt

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[7] Petitioner points to a House Report stating that the Act "would make no 'changes in existing law.'" Pet. Br. 20 (quoting H. Rep. No. 113-590, at 5 (2014)). Petitioner misconstrues the import of that language. The House Rules provide that "whenever a committee reports a bill * * * propos[es] to repeal or amend a statute or part thereof," the report must expressly delineate "the omissions and insertions proposed" to the statute being repealed or amended. Rule

that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." 80 U.S. at 145; *see also id.* ("Undoubtedly the legislature * * * may confer or withhold the right of appeal from [the Court of Claims'] decisions. And if this act did nothing more, it would be our duty to give it effect."). Legislation defining the subject-matter jurisdiction of the federal courts simply exercises Congress's authority "to tell the courts what classes they may decide," and in no manner "prescribe[s] or superintend[s] how they decide those cases[.]" *City of Arlington*, 569 U.S. at 297 (citations omitted).

Moreover, section 2(b) "must be read not in isolation, but in the context of [the Gun Lake Act] as a whole." *Miller*, 530 U.S. at 349. Section 2(b) implements and "operates in conjunction" with section 2(a), which changed the law by repealing any preexisting legal grounds for challenging the Secretary's decision to take the Bradley property into trust. *Id.* at 349. The combined effect of these provisions is to place the Secretary's decision to take the Bradley property into trust beyond dispute, whereas before the enactment of these provisions the law did not foreclose such a challenge (and arguably supported it). Because the Gun Lake Act changes the law rather than

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XIII.3(e)(1) of the U.S. House of Representatives (115th Cong.). "In order to fall within the purview of th[at] rule the bill must seek to repeal or amend *specifically* an existing law[.]" Jefferson's Manual § 846, at 651 (115th Cong.) (emphasis added). The House Report language relied on by petitioner merely explains that the Gun Lake Act does not specifically repeal or amend the text of an existing statute, and therefore need not comply with the requirements of Rule XIII.3(e).

compelling findings or results under old law, it does not impinge upon the judicial power.

B. The Gun Lake Act's Direction That Courts "Shall Promptly Dismiss" Any Action Relating To The Bradley Property Is Commonplace And Constitutionally Valid

Petitioner contends that "this Court has not previously confronted an intrusion on the judicial power quite like that effected by Section 2(b)," in that section 2(b)'s requirement that any case relating to the Bradley property "shall be promptly dismissed" is purportedly unprecedented. Pet. Br. 16; *see also id.* at 11, 12, 17, 18. Petitioner's claim depends on two demonstrably incorrect assumptions: that section 2(b)'s direction is uncommon, and that it is inappropriate for Congress to direct courts to dismiss a specified class of lawsuits.

As an initial matter, petitioner errs in contending that section 2(b) is "unusual."[8] Pet. Br. 18. For over a century, Congress has frequently enacted legislation mandating that the federal courts "shall dismiss" lawsuits in a wide variety of circumstances. *See, e.g.*, *Inhabitants of Twp. of Bernards v. Stebbins*, 109 U.S. 341, 354 (1883) (discussing statute providing that "'if * * * such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * *' that court 'shall proceed no further therein, but *shall dismiss* the suit'") (quoting 18 Stat. 470, 472 (1875)) (emphasis added); *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 339 (1895) (same); *George*

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[8] Even if the provision were unusual, which it is not, that would not cast doubt on its constitutionality. This Court described the statute at issue in *Bank Markazi* as "unusual," but nevertheless upheld it. 136 S. Ct. at 1317.

M. West Co. v. Lea, 174 U.S. 590, 596 (1899) (discussing statute providing that "'if solvency at such date is provided by the alleged bankrupt the proceedings *shall be dismissed*'") (quoting 30 Stat. 541, 547 (1898)) (emphasis added); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (discussing statute providing that certain claims presented in second or successive habeas petitions "'*shall be dismissed*'") (quoting 28 U.S.C. § 2244(b)) (emphasis added); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (discussing legislation providing that "'[t]he decision to locate the memorial at the Rainbow Pool site * * * *shall not be subject to judicial review*'" (quoting Pub. L. No. 107-11, § 3, 115 Stat. 19 (2001)) (emphasis added). Indeed, the U.S. Code is replete with such provisions.[9]

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[9] *See, e.g.*, 6 U.S.C. § 1505(a) ("No cause of action shall lie or be maintained in any court against any private entity, and such action *shall be promptly dismissed*, for the monitoring of an information system and information under section 1503(a) of this title that is conducted in accordance with this subchapter.") (emphasis added); 6 U.S.C. § 1505(b) ("No cause of action shall lie or be maintained in any court against any private entity, and such action *shall be promptly dismissed*, for the sharing or receipt of a cyber threat indicator or defensive measure under section 1503(c) of this title if [certain conditions are met].") (emphasis added); 8 U.S.C. § 1252(b)(7)(C) ("If the district court rules that the removal order [in a criminal proceeding] is invalid, the court *shall dismiss* the indictment.") (emphasis added); 10 U.S.C. § 391(d) ("No cause of action shall lie or be maintained in any court against any operationally critical contractor, and such action *shall be promptly dismissed*, for compliance with this section that is conducted in accordance with procedures established pursuant to subsection (b).") (emphasis added); 10 U.S.C. § 393(d) ("No cause of action shall lie or be maintained in any court against any cleared defense contractor, and such action *shall be promptly dismissed*, for compliance with this section that is conducted in accordance with the procedures established pursuant to subsection

Nor is there anything inappropriate about Congress directing courts to dismiss certain classes of lawsuits based on the courts' determination that a particular case falls within a specified class. It is well established that Congress in no manner "encroach[es] upon the judicial function" simply by "directing that [a court] pass upon petitioner's claims in conformity to [a] particular rule of liability * * * and to give judgment accordingly." *Pope v. United States*, 323 U.S. at 10 (collecting cases). Indeed, in *Robertson*, the Court rejected arguments based on "the imperative tone of the provision" at issue, explaining

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(a).") (emphasis added); 11 U.S.C. § 742 ("If [the Securities Investor Protection Corporation] completes the liquidation of the debtor, then the court *shall dismiss* the case.") (emphasis added); 11 U.S.C. § 1307(b) ("On the request of the debtor at any time, [if certain conditions have not been met], the court *shall dismiss* a case under this chapter.") (emphasis added); 11 U.S.C. § 1208 (requiring the same for bankruptcy proceedings under Chapter 12) (emphasis added); 22 U.S.C. § 254d ("Any action or proceeding brought against an individual who is entitled to immunity [under certain statutory provisions and treaties] * * * *shall be dismissed.*"); 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district *shall dismiss*, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.") (emphasis added); 31 U.S.C. § 3730(e)(4)(A) ("The court *shall dismiss* an action or claim under [the False Claims Act], unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed.")(emphasis added); 42 U.S.C. § 300aa-11(a)(2)(B) ("If a civil action which is barred under subparagraph (A) [of the statute authorizing the National Vaccine Injury Compensation Program] is filed in a State or Federal court, the court *shall dismiss* the action.") (emphasis added); 50 U.S.C. § 1885a(a) ("[A] civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and *shall be promptly dismissed*, if the Attorney General [provides certain certifications to the district court.]") (emphasis added).

that the use of such language in no manner undermined its conclusion that the provision compelled "a change in law, not specific results under old law." 503 U.S. at 439. Likewise, as demonstrated by the bevy of similar statutes, *see* p. 22-23, n. 9, *supra*, section 2(b)'s direction to dismiss lawsuits relating to the Bradley property is a straightforward exercise of Congress's broad legislative authority to define the jurisdiction of the federal courts.

Petitioner is simply wrong in contending that the Gun Lake Act "resembles" a statute directing "that 'Smith wins' his pending case," because it directs courts to "promptly dismiss" cases over which they lack subject-matter jurisdiction. Pet. Br. 17 (citation omitted). Far from directing the courts to declare one litigant the winner, the Act instead imposes an objective standard for the courts to interpret and apply in determining whether they have subject-matter jurisdiction over a given case. In determining whether a particular lawsuit is one "relating to" the Bradley property, the courts are engaging in a quintessentially judicial task, one that they are free to perform in the independent exercise of their unfettered judgment. Indeed, the judicial task of interpreting and applying the Gun Lake Act is no different in substance from the judicial task performed in construing countless other federal statutes. *See, e.g., Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141, 146-52 (2001) (construing 29 U.S.C. § 1144(a) to compel dismissal of plaintiff's claims as preempted because they were based on state laws that "relate to" employee benefit plans). Eliminating the federal courts' subject-matter jurisdiction over a particular category of cases delineated by an objective standard interpreted and applied by the courts does not dictate any particular merits outcome under preexisting law, nor does it "commandeer[] the courts to make a political

judgment look like a judicial one." *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting). It is well within Congress's power.

Petitioner's challenge to the "promptly dismiss" requirement also fails because that requirement merely implements and confirms section 2(b)'s plainly constitutional change in jurisdictional law. In *Miller*, state prisoners had challenged the PLRA on the ground that its automatic stay of the effectiveness of certain preexisting injunctions effectively dictated the result in those cases without itself making any change in the law. This Court squarely rejected that argument, explaining that, while the automatic-stay provision did not itself amend the underlying legal standard for imposition of injunctions, it "must be read * * * in the context of," and "operates in conjunction with," another provision of the Act that did change the standard: "Rather than prescribing a rule of decision, [the automatic-stay provision] simply imposes the consequences of the court's application of the new legal standard." 530 U.S. at 349.

Section 2(b)'s requirement that courts "shall promptly dismiss" once they determine that a case falls within the Act's jurisdictional carve-out is no more an intrusion on the judicial power than was the automatic-stay provision upheld in *Miller*. At most, it "simply imposes the consequences of the court's application of the new legal standard" for subject-matter jurisdiction. *Miller*, 530 U.S. at 349. If anything, the section 2(b) requirement is even less constitutionally suspect than was the automatic-stay provision: Section 2(b)'s effect on pending cases would be essentially the same even if Congress had not included the explicit "shall promptly dismiss" requirement, because the only option open to the federal courts in cases that they deem "relat[ed] to" the Bradley

property would be dismissal in any event. *See, e.g, Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). In short, because Congress possesses the power to eliminate subject-matter jurisdiction over this class of cases, it necessarily follows that there is no constitutional infirmity in the requirement that the federal courts "shall promptly dismiss" such cases.

CONCLUSION

"The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute." *Dalton v. Specter*, 511 U.S. 462, 477 (1994). The Court should not accept petitioner's invitation to distort the judicial power in a manner that improperly intrudes upon the long-established legislative authority of Congress. The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RECORD AND BRIEFS

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Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WAYLAND TOWNSHIP, WAYLAND AREA CHAMBER OF COMMERCE, AND OTHER LOCAL GOVERNMENTS AND BUSINESS ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

Amici Curiae are local government entities and business associations in southwest Michigan, a region that includes the 147-acre Bradley Property at issue in this case.[1] In 2009, the United States acquired the Bradley Property on behalf of Respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Band"). In 2014, Congress ratified and confirmed that the Bradley Property was taken into trust for the Band. The Band's economic development of the Bradley Property has provided, and continues to provide, substantial economic benefits to *Amici* and the local communities they serve.

Amici Wayland Township, Allegan County, City of Wayland, Dorr Township, Hopkins Township, Martin Township, Wayland Union Schools, Allegan Area Educational Service Agency, and Yankee Springs Township are local government entities in southwest Michigan that are engaged in cooperative efforts to foster economic development in an area that includes the Bradley Property. Several of the *amici* local government entities have entered into a revenue-sharing agreement with the Band pursuant to a compact between the Band and the State of Michigan that has been approved by the Secretary of the Interior on behalf of the United States.

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[1] Pursuant to this Court's Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *Amici* or their counsel made such a monetary contribution. The parties have consented in writing to the filing of this brief and their consents have been filed with the Clerk.

Amicus Deputy Sheriff's Association of Michigan is an association of sheriffs' deputies whose members benefit from economic development of the Bradley Property, which has generated revenues that are being used to hire and retain law enforcement officers and a K-9 unit.

Amici Wayland Area Chamber of Commerce, Allegan Area Chamber of Commerce, Barry County Chamber of Commerce, Barry County Economic Development Alliance, Dorr Business Association, Gun Lake Business Association, Kalamazoo Regional Chamber of Commerce, and West Michigan Hispanic Chamber of Commerce are business associations whose members benefit from the Band's economic development of the trust lands. The businesses represented by the *amici* associations would suffer a devastating loss of revenue and jobs if the federal government's decision to take the Bradley Property into trust were reversed and, as a result, the revenues generated by the Band's economic development efforts were to cease. For these local business entities, as for the local government entities, uncertainty over the status of the Bradley Property arising from continuing litigation deters investment and interferes with reliable long-term planning.

When this case first came before the Court, *Amici* submitted a brief to explain the nature and extent of the benefits that development of the Bradley Property has conferred on the local community, the importance of those benefits to local governments and businesses, and the substantial harm that is caused by a legal regime that leaves the status of trust lands such as the Bradley Property open to challenge over an extended period of time. *See* Br. of Wayland

Township *et al.* as *Amici Curiae*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak I*"), Nos. 11-246 & 11-247 (Feb. 14, 2012). In addition to addressing certain legal issues, *Amici* file this brief to confirm that the Bradley Property continues to provide substantial benefits to the community and that developments since this Court's decision in *Patchak I* support Congress's decision to eliminate the legal uncertainty over the status of the Bradley Property.

SUMMARY OF ARGUMENT

1. This Court has applied a functional approach to determine whether legislation is within Congress's powers under the Constitution. In applying this approach, the Court looks to the practical operation of the statute rather than Congress's use of "magic words or labels." *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (internal quotation marks omitted). Under the functional approach, "if the Constitution permits Congress to do exactly what [the Court] interpret[s] th[e] statute to do," the statute will not be struck down "because Congress used the wrong labels." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565 (2012). The functional approach supports affirmance in this case, because the Constitution permits Congress to do exactly what it did here.

The Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014), does two things: It ratifies the decision of the Secretary of the Interior to take the Bradley Property into trust, and it directs that litigation pertaining to the Bradley Property shall be promptly dismissed. Both results are within Congress's constitutional

powers. As to the first, Congress may exercise its broad powers to regulate Indian affairs and dispose of property belonging to the United States by directing that particular property shall be held in trust for the Band. As to the second, Congress may exercise its powers to define and limit the jurisdiction of federal courts, and to limit waivers of federal sovereign immunity, by directing that non-final cases concerning the Bradley Property shall be promptly dismissed.

Petitioner argues that the Gun Lake Act should not be treated as a jurisdiction-limiting statute because it does not use the word "jurisdiction." But the Gun Lake Act is reasonably interpreted as a restriction on jurisdiction (or, alternatively, as a restriction on Congress's waiver of sovereign immunity) because it requires the dismissal of cases concerning the Bradley Property without regard to any procedural step the litigants may have taken or failed to take. Even if that were not so, the Gun Lake Act should be upheld under the functional approach, because its practical results are within Congress's powers under the Constitution.

2. In *Patchak I*, the Band and its *amici* argued that continuing litigation over the status of the Bradley Property posed a significant obstacle to the Band's ability to attract investment and promote economic development on lands taken into trust. The Court noted that this argument is "not without force, but it must be addressed to Congress." 567 U.S. 209, 223 (2012). Congress has now addressed that argument and determined that litigation concerning the Bradley Property should come to an end. The substantial economic benefits generated by the Band's

development of the Bradley Property – including the direct creation of more than 1,000 jobs and a revenue-sharing agreement with local governments – support Congress's policy judgment embodied in the Gun Lake Act. By ending the uncertainty arising from continuing litigation, Congress cleared the way for the Band and the surrounding community to realize additional benefits from the Bradley Property.

ARGUMENT

I. The Gun Lake Act Is Within Congress's Powers Under the Constitution.

A. The Constitutional Analysis Turns on the Practical Operation of the Statute Rather Than the Precise Words Congress Used.

In the Gun Lake Act, Congress ratified and confirmed the decision of the Secretary of Interior to take the Bradley Property into trust and directed that, notwithstanding any other provision of law, actions pertaining to the Bradley Property shall be promptly dismissed. *See* 128 Stat. 1913. Both these results are within the powers granted to Congress by the Constitution. In deciding to take the Bradley Property into trust, the Secretary exercised authority delegated by Congress under the Indian Reorganization Act. 25 U.S.C. § 5108. Congress undoubtedly retains authority to direct that particular property belonging to the United States be taken into trust, and to exercise that authority without regard to limitations that Congress placed on the Secretary's exercise of delegated authority under the Indian Reorganization Act. Moreover, the Constitution grants Congress extensive authority to

determine the extent of the federal courts' jurisdiction to hear and decide cases. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389, 401 (1973).

Petitioner argues that Congress exceeded its constitutional powers by directing that a pending lawsuit be dismissed without "amending underlying substantive or procedural laws." Pet. Br. 18. In responding to this argument, the Federal Respondents and the Band properly emphasize the settled rule that "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). In applying this rule, the courts do not ask whether a saving construction is the best or most natural interpretation of the statutory language, but only whether it is a "fairly possible" construction. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Federal Respondents and the Band demonstrate that this "fair construction" principle is sufficient to refute Petitioner's constitutional argument. *See* Fed. Resp. Br. 19-23, 26-27; Band Br. 19-23, 32-34.

An additional principle lends further support to that result. In considering whether legislation is a valid exercise of Congress's power to "lay and collect Taxes," Art. I, § 8, cl. 1, the Court has held that the presence or absence of "magic words or labels" should not "disable an otherwise constitutional levy." *Quill*, 504 U.S. at 310 (internal quotation marks omitted). Instead, in "passing on the constitutionality of a tax law," the Court is "concerned only with its practical operation, not its definition or the precise form of descriptive words that may be applied to it." *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (internal quotation marks omitted). The Court

applied this "functional" approach to uphold the constitutionality of the Affordable Care Act, rejecting an argument that "even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels." *Sebelius*, 567 U.S. at 565, 569.

There is no valid reason to limit this functional approach to statutes that can be upheld as a valid exercise of the taxing power. *Cf. Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (noting that Congress need not "incant magic words" to render a statutory limitation jurisdictional). Indeed, the functional approach and the principle that any "fairly possible" saving construction must be adopted are two aspects of the broader principle that "[p]roper respect for a co-ordinate branch of the government" requires that the Court strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States v. Harris*, 106 U.S. 629, 635 (1883). Accordingly, the Court should not strike down the Gun Lake Act unless it concludes that the practical results of the statute exceed Congress's powers under the Constitution.

B. Under a Functional Analysis, the Gun Lake Act Is Constitutional.

Multiple powers granted to Congress in the Constitution support the validity of the Gun Lake Act. Congress has power to "dispose of . . . Property belonging to the United States" under Art. IV, § 3, cl. 2. It also has "plenary and exclusive" power to regulate Indian affairs under Art. I, § 8, cl. 3. *United States v. Lara*, 541 U.S. 193, 200 (2004) (internal quotation marks omitted). In addition, this Court's appellate jurisdiction is expressly subject to "such

Exceptions, and . . . Regulations as the Congress shall make," Art. III, § 2, cl. 2, and Congress has unrestricted authority to "ordain and establish" inferior federal courts, Art. III, § 1, cl. 1.

These multiple powers are sufficient to uphold the Gun Lake Act. Indeed, this Court suggested as much in *Patchak I* by noting that Congress could, and perhaps "should," expand the preclusion of judicial review in the Quiet Title Act to "the full range of lawsuits pertaining to the Government's ownership of land." 567 U.S. at 224. Having considered the matter, Congress has determined that the full range of lawsuits pertaining to the Government's ownership of the Bradley Property should be precluded.

As both the United States and the Band note, Congress did not direct the courts to reach any particular result – or, indeed, any result – on the merits. Instead, Congress simply directed that any cases concerning the Bradley Property shall be promptly dismissed. Because Congress did not direct the courts to reach a particular result on the merits, or otherwise endorse Congress's policy decision in the Gun Lake Act, Congress did not "commandeer[] the courts to make a political judgment look like a judicial one." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1337 (2016) (Roberts, C.J., dissenting). Nor does the Gun Lake Act "retroactively command[] the federal courts to reopen final judgments" or "vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 219 (1995).

In addition, as the Federal Respondents and the Band explain, the Gun Lake Act need not – and therefore must not – be construed as "usurp[ing] a

court's power to interpret and apply the law to the [circumstances] before it." *Bank Markazi*, 136 S. Ct. at 1323 (internal quotation marks omitted). As this Court has recognized, Congress has the power to enact legislation that alters the outcome of a pending civil case. *See id.* at 1317 (Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative."). Congress may enact such legislation even if it applies to a very small number of cases. *See id.* at 1328 (noting that the Court has "upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects"); *see also Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (upholding legislation enacted to resolve a small number of pending cases identified by name and docket number in the statute at issue).

"The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress. . . ." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 125 (1981). It is well-settled that Congress's power to limit the jurisdiction of federal courts applies to cases that are pending when a jurisdictional statute is enacted. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (stating that the Court "regularly applie[s] intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay . . . when the suit was filed"). *See also Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("[J]urisdiction having been conferred may, at the will of Congress, be taken away"; if that happens, "all pending cases though cognizable when commenced must fall").

Petitioner contends that the Gun Lake Act is not a jurisdiction-limiting statute because it does not use the word "jurisdiction." But as noted above, this Court does not ask whether Congress used the proper "magic words" when it determines whether a statute is constitutional; instead, it applies a functional approach and asks whether "the Constitution permits Congress to do exactly what we interpret this statute to do." *Sebelius*, 567 U.S. at 569.

In any event, it is fairly possible to interpret the language Congress used in the Gun Lake Act as withdrawing jurisdiction to consider cases concerning the Bradley Property. The statute provides that actions relating to the Bradley Property "shall be promptly dismissed." § 2(b), 128 Stat. 1913. Dismissal is required without regard to any procedural steps the litigants may have taken or failed to take. This statutory language is fairly interpreted as withdrawing jurisdiction from the federal courts. Alternatively, the statute can fairly be interpreted as withdrawing the government's waiver of sovereign immunity in cases concerning the Bradley Property. *See* Fed. Resp. Br. 17; Band Br. 15-26.

This case is similar in many ways to *Robertson*. There, the Court upheld legislation enacted by Congress specifically to resolve "ongoing litigation." 503 U.S. at 433. The Court acknowledged that the statute applied "within a geographically and temporally limited domain," identified the "pending cases" it affected "by name and caption number," and had a dispositive effect on "two pending cases." *Id.* at 433, 440. The Court nevertheless held that it was "possible" to interpret the statute at issue as

"amend[ing] applicable law," and therefore concluded that the statute at issue was constitutional without considering the validity of the challenger's expansive reading of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *Robertson*, 503 U.S. at 441.

The Court can, and therefore should, follow the same approach here. It is fairly possible to interpret the Gun Lake Act as withdrawing the court's jurisdiction over cases concerning the Bradley Property or as withdrawing the government's waiver of sovereign immunity from such suits. Moreover, the Gun Lake Act is constitutional if the Court applies a functional approach that looks beyond the particular form of words Congress used to the practical results of the statute.

Ultimately, Petitioner's argument comes down to an assertion that the Gun Lake Act is unconstitutional because Congress used the wrong words. But where, as in this case, the issue is whether Congress has exceeded the scope of its powers under the Constitution, the words in the statute are less important than the practical results it enacts. The practical results of the Gun Lake Act are within Congress's broad powers to dispose of property belonging to the United States, to regulate Indian affairs, to determine the jurisdiction of federal courts, and to waive (or not waive) the government's sovereign immunity.

II. The Band's Development of the Trust Lands Provides Substantial Benefits to Local Businesses and Governments.

In *Patchak I*, Wayland Township and other local governments and business associations filed a

brief as *Amici Curiae* that described the significant economic benefits the Band's development of the Bradley Property provided to the surrounding community, including numerous jobs, customers for many small businesses, and revenue for local government programs. *See* Br. of Wayland Township, *et al.* in *Patchak I*. In that brief, *Amici* argued that lawsuits such as this one create legal uncertainty that poses a significant obstacle to the Band's ability to attract investment and promote economic development on lands taken into trust. The Court recognized that this argument is "not without force, but must be addressed to Congress." 567 U.S. at 223.

Congress has now considered that argument and determined that a broad ban on litigation concerning the status of the Bradley Property is warranted. As the Court noted in *Patchak I*, this policy determination is for Congress rather than the courts. *Amici* nevertheless file this brief to demonstrate that the Bradley Property continues to provide significant benefits to the local community that support the policy choice made by Congress.

The development of the Bradley Property has provided a much-needed boost to southwest Michigan's economy. The Band's economic development efforts on the trust lands have directly created over 1,000 new jobs and infused area hotels, restaurants, and other businesses with much-needed customers and revenues. Additionally, in May 2007, the Band entered into a revenue-sharing agreement with the State of Michigan ("Agreement"), which the Secretary of the Interior approved. The Agreement provides the state and local governments with essential resources for schools, roads, sewer and water

systems, city parks, police and fire departments, public safety programs, and other critical needs.[2]

It is difficult for *Amici* to engage in long-term planning, develop and approve budgets, and implement strategies for business growth and economic development when a significant source of projected revenue is at risk. For example, local government *amici* are pursuing new initiatives, including ones requiring significant expenditures that will likely be financed through municipal bonds. Repaying the bonds over time requires a dependable source of revenues from the trust lands. Likewise, businesses that depend on additional demand for their products and services resulting from the development of the trust lands face additional uncertainty in deciding whether to expand and hire additional workers.

A. Development of the Trust Lands Has Created Over One Thousand Jobs.

The economic development of the Bradley Property has directly created over 1,000 new jobs.[3] These new jobs are vitally needed. In August 2009, the month before ground was broken on Gun Lake

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[2] Match-E-Be-Nash-She-Wish/Wayland Township Area, Local Revenue Sharing Board, News and Events (Dec. 2016), http://www.gunlakerevenuesharingbd.org/News%20and%20Events.html.

[3] Jim Harger, *Gun Lake Casino pays out $6.7M in revenue sharing for state and local entities*, MLive (June 1, 2017), http://www.mlive.com/business/west-michigan/index.ssf/2017/06/gun_lake_casino_pays_out_67m_i.html (noting that Gun Lake Casino employs more than 1,000 workers).

Casino, Allegan County reported a 12.6 percent unemployment rate[4] – three percentage points higher than the national unemployment rate of 9.6 percent.[5] Just a year later, the national employment had essentially remained unchanged (at 9.5 percent),[6] but Allegan County's employment rate had dropped by more than two percentage points to 10.3 percent.[7] With the economic development of the Bradley Property, the unemployment rate is down to 2.7 percent in Allegan County as of April 2017,[8] nearly two percentage points *below* the national unemployment rate of 4.4 percent.[9] The Gun Lake Casino is now the sixth-largest employer in Allegan County.[10]

In addition to the 1,000-plus people that Gun Lake Casino employs, approximately 750 skilled workers – including plumbers, electricians, carpenters, and sheet metal workers[11] – were

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[4] U.S. Bureau of Labor Statistics, Local Area Unemployment Statistics Map ("Local Unemployment Statistics"), https://data.bls.gov/map/MapToolServlet?survey=la.

[5] U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (Sept. 15, 2017) ("Labor Force Statistics"), https://data.bls.gov/timeseries/LNS14000000.

[6] *Id.*

[7] Local Unemployment Statistics, *supra* n. 4.

[8] *Id.*

[9] Labor Force Statistics, *supra* n. 5.

[10] Allegan County Economic Development Commission, Largest County Employers, http://www.alleganconntyedc.org/facts/employers.html.

[11] Kathy Jennings, *Gun Lake Casino opening weekend draws a full house*, Sw. Mich.'s Second Wave (Feb. 17, 2011),

employed during the construction of the $165 million facility.[12] A recent $76 million expansion of the facility resulted in the employment of 300 to 400 skilled workers.[13] A new five-story parking deck that the facility is constructing will create approximately 75 jobs for construction workers.[14]

Development of the trust lands also indirectly created an estimated 1,000 outside vendor jobs during the course of initial construction alone.[15] The creation of new jobs for Gun Lake Casino's expansion is expected to boost the local economy and expand the tax base for local governments.[16]

B. Development of the Trust Lands Has Generated Other Significant Economic Benefits.

At the time of initial development of the trust lands, the Band estimated that, as a result of its

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http://www.secondwavemedia.com/southwest-michigan/devnews/casino0217.aspx.

[12] Herb Woerpel, *Tribe secures $165 million loan for Gun Lake Casino*, Penasee Globe (July 20, 2010), http://www.mlive.com/penaseeglobe/index.ssf/2010/07/tribe_secures_165_million_loan.html.

[13] Logan Crawford, *Gun Lake Casino expansion could have big impact on Allegan, Barry Counties*, WWMT (Apr. 13, 2016), http://wwmt.com/news/local/gun-lake-casino-expansion-could-have-big-impact-on-allegan-barry-counties.

[14] Jim Harger, *Gun Lake Casino opens new 'high-limit' room, adds more parking*, MLive (Sept. 7, 2017), http://www.mlive.com/business/west-michigan/index.ssf/2017/09/gun_lake_casino_opens_new_high.html.

[15] Jenninga, *supra* n. 11.

[16] Crawford, *supra* n. 13.

development of the trust lands, it would spend approximately $30 million annually to purchase vendor goods and services.[17] The Band also estimated that the gaming facility will create 60,000 new guest stays per year at area hotels.[18] Local vendors also expected the gaming facility's recent expansion to increase their revenues.[19]

The Band has also invested in economic development projects that are increasing employment opportunities in southwest Michigan, including the recent construction of a $4.4 million fuel and convenience store located near the gaming facility.[20] For the six-month period ending March 31, 2017, the gaming facility made revenue-sharing distributions of $1.12 million to pursue non-gaming economic development and job creation.[21]

C. Development of the Trust Lands Has Increased Local Government Revenues.

Under the revenue-sharing Agreement, the Band pays a percentage of the revenues from the gaming facility to the State and to local government

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[17] Pete Daly, *Gun Lake Casino has foes at bay*, Grand Rapids Bus. J. (Sept. 5, 2009), http://www.grbj.com/articles/70969.

[18] *Id.*

[19] Crawford, *supra* n. 13.

[20] *Gun Lake Investments, MEDC Announce Fuel and Convenience Store Project at Gun Lake Casino*, Native News Online.Net (Oct. 28, 2016), http://nativenewsonline.net/currents/gun-lake-investments-medc-announce-fuel-convenience-store-project-gun-lake-casino/.

[21] Harger, *supra* n. 3.

entities close to the trust lands. Pursuant to the Agreement, the Band and ten public agencies (each of which has joined this brief as an *amicus curiae*) created a Local Revenue Sharing Board ("the Board").[22] The Board is an independent legal entity charged with establishing criteria and formulas for distributing a portion of the revenues from the gaming facility to the local governments.

Distributions are made to the state and local governments every six months and have totaled over $93 million as of March 31, 2017. For example, in December 2016, local governments received revenue-sharing distributions totaling $1.89 million for the six-month period ending September 30, 2016. Under a formula set out in the Board's bylaws, Wayland Township received a total of $414,914, Allegan County received a total of $333,848, Wayland Schools received a total of $918,668, Allegan Area Educational Service Agency received a total of $135,053, and City of Wayland, Dorr Township, Martin Township, Hopkins Township, Yankee Springs Township, and Leighton Township each received $14,917.[23] Most recently, in May 2017, for the six-month period ending March 31, 2017, the State of Michigan received revenue-sharing

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[22] The public agencies are Allegan County, Township of Wayland, Wayland Union School District, Allegan Area Educational Service Agency, City of Wayland, Township of Dorr, Township of Leighton, Township of Martin, Township of Hopkins, and Township of Yankee Springs.

[23] Match-E-Be-Nash-She-Wish/Wayland Township Area, Local Revenue Sharing Board, News and Events (Dec. 2016), http://www.gunlakerevenuesharingbd.org/News%20and%20Events.html.

distributions of $3.75 million, while local governments received a total of $1.87 million.[24]

Local governments have relied on their revenue-sharing distributions to plan critical infrastructure projects and other initiatives that would not have been possible absent the Band's continued development of the trust lands. Wayland Township, for example, is planning to construct a new water and sewer treatment system that would replace the current septic system and provide significant environmental benefits.[25] Wayland Township has used its revenue-sharing distributions to purchase property needed for this project.

The Agreement has facilitated the efforts of local communities to improve their public safety programs and engage in collaborative intergovernmental agreements. For example, Wayland Township is using a portion of the funds generated by the trust lands to fund a contract with the Allegan County Sheriff's Department under which Allegan County will provide two deputies dedicated to patrolling Wayland Township.[26] This cooperative

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[24] Harger, *supra* n. 3.

[25] Sherry Kuyt, *Water, sewer system could be a long way off for Wayland Township*, MLive (Apr. 25, 2016), http://www.mlive.com/wayland/index.ssf/2016/04/modern_utilities_could_be_a_lo.html.

[26] Herb Woerpel, *Wayland Township to add two Allegan County Sheriff's deputies using Gun Lake Casino disbu[r]sment*, MLive (June 2, 2011), http://www.mlive.com/penaseeglobe/index.ssf/2011/06/wayland_township_to_add_two_al.html.

venture strengthens intergovernmental cooperation, in addition to improving public safety.

The Band's economic development of the trust lands has provided benefits to local communities in addition to those provided under the Agreement. For example, in 2011, the Band donated funds to the Allegan County Sheriff's Department for the purchase of a police dog that can be used for "search and rescue tactics, locating a lost child, and identifying illegal substances."[27] In 2017, the Band made an additional donation for a new police dog to replace one that was retiring.[28] Also in 2017, the Band donated funds to Hopkins Public Schools to buy technological equipment designed to advance student learning.[29]

D. Continuing Legal Uncertainty Undermines the Benefits Derived From Economic Development of the Trust Lands.

A basic function of the law is to provide predictability. *See, e.g.*, *Regan v. New York*, 349 U.S. 58, 64 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs . . . ."). Nowhere is this consideration more significant than in the context of title to real

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[27] Gale Courey Toensing, *Gun Lake Tribe Donates K-9 to County Sheriff's Department*, Indian Country Today (Aug. 28, 2011), https://indiancountrymedianetwork.com/news/gun-lake-tribe-donates-k-9-to-county-sheriffs-department/.

[28] Bob Brenzing, *Casino donates $15k to sheriff for K9 unit*, Fox 17 W. Mich. (July 26, 2017), http://fox17online.com/2017/07/26/casino-donates-15k-to-sheriff-for-k9-unit/.

[29] *Gun Lake Tribe gives Hopkins Schools $93,000 for tech purchases*, WWMT (Aug. 16, 2017), http://wwmt.com/news/local/gun-lake-tribe-gives-hopkins-schools-93m-for-tech-purchases.

property. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) ("[P]redictability and stability are of prime importance" in the context of "property rights.") (internal quotation marks omitted).

By enacting the Gun Lake Act, Congress recognized that the continuing uncertainty generated by this case posed a significant obstacle to realizing the full benefits of the Band's economic development efforts. In order for businesses to make long-term investments, they must be reasonably confident that the investment will be worthwhile. Thus, for example, a hotel operator may cancel or delay plans to build a new hotel or expand an existing hotel because the status of the trust land, and therefore the casino, is uncertain.

Similarly, local governments must be able to rely on the federal government's decision to take the Bradley Property into trust in order to undertake infrastructure improvements and adopt other long-term programs. When a public infrastructure project is stifled due to this uncertainty, it can result in major ripple effects on other economic development efforts.

As noted above, Wayland Township has plans to construct a $17 million environmentally-friendly wastewater treatment facility. The new facility would provide needed utility infrastructure to areas of the Township, including the area around the Bradley Property. Without this infrastructure, the Township is unable to attract additional economic investment to

the area.[30] As a result, the area remains undeveloped even though it is quite close to the gaming facility and more than 60,000 vehicles pass by the area each day.[31]

The continued operation of Gun Lake Casino is central to Wayland Township's efforts to build this facility. Although the revenue-sharing distributions will not directly or fully fund construction of the facility, the expected revenue distributions could be used as collateral to secure the necessary financing.

Additionally, Wayland Township will need to issue revenue bonds or special assessment bonds to fund the new wastewater treatment facility. The Township cannot issue those bonds without knowing whether the Band will continue to operate the casino and pay the fees that will enable the Township to repay the principal and interest on the bonds. *See* Mich. Comp. Laws §§ 141.107, 41.735. Bonds cannot be issued while litigation continues to hold the revenue stream in peril.

Investment in the Gun Lake Casino, including the recent expansion, has already totaled $241 million.[32] The recent expansion would likely result in additional economic development in the immediate vicinity if the Township were able to move forward with building the wastewater treatment facility. This economic development can occur only if the trust status of the land is stable and local governments and

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[30] *See* Koco McAboy, *As Gun Lake Casino expands, area remains empty*, WoodTV (Jan. 7, 2016), http://woodtv.com/2016/01/07/as-gun-lake-casino-expands-area-remains-empty/.

[31] *Id.*

[32] Woerpel, *supra* n. 12; Crawford, *supra* n. 13.

businesses can rely on it as a basis for economic planning.

These infrastructure issues illustrate the practical problems that can arise from lengthy litigation over the status of property held in trust for an Indian tribe, and they help to explain why Congress chose to end continuing legal uncertainty over the status of the Bradley Property.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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